TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 349

REUBEN WELLER, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

IN ERROR TO THE COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK, STATE OF NEW YORK

FILED APRIL 2, 1924

(30,240)

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 23, 1924

[fol. 1] **IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT**

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

against

REUBEN WELLER, Defendant, Appellant

STATEMENT UNDER RULE 234

This was a criminal action brought on behalf of the People of the State of New York against the defendant, Reuben Weller, upon an information filed in the Court of Special Sessions of the City of New York on the 27th day of November, 1922. The defendant pleaded thereto on the 7th day of December, 1922. The names of the original parties are as stated in the above title. The People was represented by the Hon. Joab H. Banton, District Attorney, New York, and the defendant was represented by Messrs. Guggenheimer, Untermyer and Marshall. There has been no change of attorneys herein.

[fol. 2] IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK, COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff,

against

REUBEN WELLER, Defendant

NOTICE OF APPEAL

SIRS: Please take notice that the above-named defendant, Reuben Weller, hereby appeals to the Appellate Division of the Supreme Court, held in and for the First Judicial Department, from the judgment of conviction rendered against the above-named defendant in the above-named court on the 16th day of February, 1923, convicting the defendant of a violation of Sections 168 and 169 of the General Business Law, added by Chapter 590 of the Laws of 1922, and imposing a fine of $25 and upon the failure to pay said fine that the defendant serve five (5) days in the penitentiary of the County of New York, and from each and every part of said judgment, as well as from the whole thereof.

Dated, New York, February 16, 1923.

Yours, &c., Guggenheimer, Untermyer & Marshall, Attorneys for Defendant.

Office and Post Office Address, 120 Broadway, Borough of Manhattan, New York City.

[fol. 3] To Hon. Joab H. Banton, District Attorney, New York County, — —— ——, Clerk of the Court of Special Sessions.

IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK

[Title omitted]

INFORMATION

Be it remembered that I, Joab H. Banton, the District Attorney of the County of New York, by this information, accuse the above-named defendant of the crime of unlawfully reselling tickets to a theatre and place of amusement, committed as follows:

The said defendant on the 26th day of October, 1922, at The City of New York, in the County of New York, unlawfully did engage in the business of reselling tickets of admission to a theatre and place of amusement and did resell to one John Cunniff, a ticket of admission to a certain theatre and place of amusement called Palace Theatre, without first having obtained the necessary license thereof from the Comptroller of the State of New York as required by law.

Joab H. Banton, District Attorney.

[fol. 4] IN COURT OF SPECIAL SESSIONS

[Title omitted]

JUDGMENT APPEALED FROM

It is thereupon ordered and adjudged by the Court, that the said Reuben Weller for the misdemeanor aforesaid, whereof he is convicted, pay a fine of Twenty-five Dollars. And it is further ordered that he stand committed to the custody of the Keeper of the City Prison of The City of New York until the said fine be paid, but not exceed five days.

A true extract from the minutes.

Joseph F. Moss, Jr., Clerk of Court.

[fol. 5] IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK

[Title omitted]

Before Hon. Moses Herrman, Presiding Justice; Hon. Thomas J. Nolan, Associate Justice; Hon. Albert V. B. Voorhees, Associate Justice

January 5th, 1923.

Appearances:

For the People: Asst. District Attorneys John T. Hogan, Edward J. Kilroe, Robert D. Petty, Felix C. Benvenga.

For the Defendant: Louis Marshall, Esq., Guggenheimer, Untermyer & Marshall, 120 Broadway, New York City.

J. J. Garvey, Official Stenographer.

[fol. 6] Mr. Marshall: The defendant is not here but we will admit all the facts and try the defendant in his absence. The facts will all be admitted.

Mr. Hogan: We would like to have the police officer testify to show some semblance of a trial.

The Court: Call your witness.

JOHN CUNIFF, a Police Officer, shield number 551, attached to the Main Office Division, the complainant, being duly sworn, testified as follows:

Direct examination by Mr. Hogan:

Q. You are a police officer of the Police Department, attached to the District Attorney's Office?

A. Yes, sir.

Q. Of the County of New York?

A. Yes, sir.

Q. Do you know this defendant, Reuben Weller?

A. I do.

Q. On the 26th day of October, 1922, did you see Mr. Weller?

A. I did.

Q. Will you kindly state in detail the circumstances under which you did see him, and the conversation, if any, that you had with him?

A. I went into the defendant's place of business, at 1560 Broadway.

Q. Located in this City, in the Borough of Manhattan, County of New York?

A. Yes, sir.

Q. What did you do after entering his place of business

A. I purchased two tickets and paid for them, and I asked him if he was in the business of selling tickets, and I asked him if he had a license to resell tickets under this law and he said, he did not, and I placed him under arrest.

[fol. 7] Q. Did you ask him anything with reference to the law of the State Comptroller?

A. I did.

Q. Are these tickets that were purchased by you?

A. Yes, sir.

Q. And that he sold you?

A. Yes, sir.

Q. How much money did you pay the defendant for these two tickets?

A. My recollection was $2.00 apiece, $4.00 for the two tickets.

Mr. Hogan: I offer the two tickets in evidence.

The Court: Received.

(Marked People's Exhibit One in Evidence.) (Two tickets.)

("Left G 8. Orches. $1.10.
B. F. Keith's Palace.
Th. Good Only Matinee Oct. 26.

B. F. Keith's
Palace
Theatre,
Broadway & 47th St.
Oct. 26, Thursday Matinee.
Th. Estab. Price $1.00.
Tax Paid 10¢. Total $1.10.
If sold or resold in violation of the provision of the Theatre Ticket Ordinance, approved Dec. 28th, 1918, this ticket will be refused at the door.
See reverse side for important notice. Back of ticket.

Notice Agreement

This ticket is sold and purchased upon the express understanding [fol. 8] that it is and shall be a personal license, not transferable and good only to admit the person who purchased it at the box office of the Palace Theatre. If resold or purchased from any other person, or from a speculator or at any other place than said box office, it shall be absolutely void, not good for admission and the Palace Theatre and Realty Company originally selling this ticket may retain the sum paid therefor as liquidated damages."
"Left G 9, same as above.")

Q. Did you ask the defendant if he had taken out a bond in pursuance to the law?
A. I did, and I also asked him if he was aware of the new law that required him to have a bond and he said, he was, and I said, up to the present you have not taken out a bond, and he said, no.

Mr. Hogan: Will it be conceded by Mr. Marshall, the People's Exhibit One in Evidence, two Palace Theatre tickets, are tickets of admission to the Palace Theatre and entitled the holder to admission on the date stamped thereon, to the matinee of Thursday, October 26th, 1922.
Mr. Marshall: I will concede that.

Q. Did you ask the defendant, if he was in the business of reselling theatre tickets?
A. I did.
Q. What did he say in response to that question?
A. He said, he was for the last ten years.

Mr. Hogan: Will it be conceded that the defendant has not complied with Section 168, of the General Business Law.
[fol. 9] Mr. Marshall: I will concede that Mr. Weller did not have a license and has not had a license and that he did not give a bond, and that he did not comply with the requirements of the statute, which is Chapter 590, of the Laws of 1922.
Mr. Hogan: With that concession, that is the People's case.
Mr. Marshall: I will also admit that he did not make an application because, I advised him that the law was unconstitutional.
Mr. Hogan: People's case.

DAVID MARKS, a witness called by the defense, being duly sworn, testified as follows:

Direct examination by Mr. Marshall:

Q. You reside in the City of New York?
A. Yes, sir, at 166 West 87th Street.
Q. What is your business?
A. Theatre ticket broker.
Q. How long in that business?
A. Thirty years.
Q. Are you well acquainted with the theatre ticket brokerage business?
A. Yes, sir.
Q. Do you know how long that business has been carried on in this community?
A. Over sixty years.
Q. Do you know who the pioneer of that business was?
A. George Tyson.
Q. Is that business still in existence?
A. Yes, sir.
[fol. 10] Q. How long in business?
A. Fifty-one years.
Q. What do you know about the duration of the existence of the McBride Agency?
A. Forty-five years approximately.
Q. In a general way, how is that business carried on and has it been carried on?
A. We have charge accounts with various people in the City of New York and outside of New York and we do a cash business, and a charge of fifty cents is still maintained in the large offices in the City of New York.
Q. And occasionally you charge more?
A. Yes, sir.
Q. Why is that?
A. We are compelled to buy merchandise months in advance, and if the show is a poor show the loss is ours.
Q. You look upon these tickets as merchandise?
A. Yes, sir.
Q. Whom do you get these tickets from?
A. Theatre managers.
Q. How do you get them from the theatrical managers?
A. We buy them in blocks, each office is allowed so many seats.
Q. The theatrical managers put on a production, whatever the play may be?
A. Yes, sir.
Q. Then they say to the ticket brokers, that they will allow them to have a certain number of tickets for that production?
A. Yes, sir.
Q. When is that part of the arrangement made?
A. Before the show is cast and before we know anything about

who is in the show, we are sent for and told how many tickets we are to get and each office has to pay, is compelled to buy.

Q. Who sends for you?

A. The managers of the various productions.

[fol. 11] Mr. Hogan: I move to strike out the testimony up to the present time given by this witness on the ground that it is irrelevant, incompetent and immaterial. If Mr. Marshall concedes the facts, what is the purpose of this line of examination?

Mr. Marshall: Here is an act of the legislature which deals with a business that has been established for sixty years. It undertakes to fix the price that must be paid for tickets. It requires a bond and also requires a license, and the provisions are interwoven with the price that is to be charged for the tickets. Our contention is, that the attempt to regulate what price shall be is in violation of the Constitution, both of the State and the United States. We have had that question before the Court of General Sessions, in the case of the People against Cohen and the People against Newman, in which case Mr. Justice Rosalsky wrote a very elaborate opinion and in which he holds that a statute or ordinance that would attempt to regulate the price of tickets is unconstitutional. This statute provides for the procuring of a license and also the price at which tickets shall be sold, and provides that a bond shall be given by a person who obtains a license, and that the license can be revoked and the bond enforced if there is any violation of statute. Consequently, if a charge is made beyond the price fixed by the statute, that would result in a nullification of the license and would at once create a [fol. 12] liability on the bond. Therefore, under the decisions, whatever might be the law as to the right to require a license, but for these provisions the whole statute is made null and void by their presence. I will be able to show this by a number of decisions of the Court of Appeals and of the United States Supreme Court. It is therefore necessary to show the method in which this business of selling tickets is carried on.

Mr. Petty: The defendant's attorney, Mr. Marshall has referred to the case of the People against Newman, 109 Miscellaneous Reports, and the Court there gave as one of its grounds, that the offense charged was a violation of an ordinance and not of an act of the legislature, on page 659. And further on stated, that error was committed by the Magistrate by excluding evidence offered by the defendants; and on page 652 of the same opinion his Honor says, while reasonableness of an act of the legislature may not be questioned, that is not the case where the Board of Aldermen pass an ordinance. This is not an ordinance but the act of the legislature and every presumption is in favor of the finding of the legislature. I would ask your Honor to look at Section 167, and say that we have the right to infer from that, that the legislature looked into these facts, and all the courts have held that when the legislature looks into the facts, they are competent to do so, and the case of the People against Newman has no bearing on the question, as that was a violation of an ordinance.

[fol. 13] Mr. Marshall: We are not going to try anything except the question of the validity of the statute but in order to get the proper light on the subject I am offering this testimony. It may not be known by the Court how the business is carried on, and how it is serving the public, and what the charge is made for. It is not so much for commodity as for the service of procuring the commodity for the person who desires the ticket. These facts are useful as giving a proper background to this case. Governor Miller vetoed a similar bill in 1921, and although he signed the bill of 1922, he expressed serious doubts of its constitutionality. The legislature cannot make a law constitutional or unconstitutional by labelling it a certain way. That is a matter that I shall presently discuss. What we are now interested in is to show how this business is conducted and the reason why it is necessary at times to charge more than fifty cents for a ticket. It can do no harm to take this evidence and your Honors may conclude to disregard it when you decide this case.

Mr. Petty: I am familiar with Governor Miller's letter, and it indicates the tendency of the times. The first bill he vetoed and the second he signed, and he stated that the licensing feature of the bill was valid. No doubt it is true, that a legislative declaration of facts that a certain use is a public one may not be held conclusive, but the declaration of the legislature is entitled to great respect.

[fol. 14] I think we are willing to let this go in the record under our objection.

The Court: Your motion to strike out is denied.

By Mr. Marshall:

Q. You are telling us just how the brokers get their tickets from the various theatre owners. You say, that when an attraction is about to be put on the boards, before there has been a production of the play at all, you are sent for, the various brokers, by the theatre owners and a conversation takes place?

A. Yes, sir.

Q. What is the nature of the conversation?

A. We are going to produce—the manager of the theatre representing the owner of the theatre, we are going to produce a show four weeks from next Monday night and it is going to open at a certain theatre, and they say, how many seats do you want for that show for eight weeks in advance. We have asked for time to see how many we can use for that production at that particular theatre, and we are not given time in many cases and we must purchase the number of tickets, and we have got to buy them for eight weeks in advance, and we don't know the name of the show or the cast, and we are compelled to buy them at four and five dollars a piece plus the war tax and compelled to pay for them and pay for them at that rate for eight weeks in advance, running into an investment of fifty or sixty thousand dollars.

Q. In other words, you finance the theatrical performance?

A. Yes, sir.

[fol. 15] Q. And you have to pay in advance?

A. Yes, sir, and it takes hundreds of thousands of dollars.

Q. Suppose the play is not a success?

A. They are left on our hands. We have a return privilege of twenty-five, sometimes fifteen and sometimes ten. If a person wants three tickets and we make a $1.50 total profit on tickets that may have cost four or five dollars apiece.

Q. That has been going on all these years?

A. Yes, sir.

Q. And that is still the practice today?

A. Yes, sir.

Q. Do they ever take these plays off the boards before the full period of time?

A. I have not heard of two cases where they stopped the show.

Q. You have not heard of more than two or three cases, where notwithstanding the fact that the play is a failure they have stopped the performance?

A. Yes, sir.

Q. And because you are bound to pay this amount, it is a dead loss if you cannot sell the tickets?

A. Yes, sir, a loss of thousands of dollars on a production.

Q. And that is your experience?

A. Yes, sir.

Q. They allocate to the several ticket brokers of the city the number of tickets that they may have and the number that they are required to take if they want any tickets?

A. Yes, sir, right.

Q. What is the organization of these different ticket brokerage concerns?

A. They have a place of business. We pay twenty thousand dollars a year rent, with a twenty years lease, and our expenses are $156,000 a year, with the lease, book keepers, stenographer, salesmen [fol. 16] and messengers and we are only the third largest in the City of New York.

Q. Which is the largest in the city?

A. Tyson Company, $500,000 a year.

Q. Why do you need this large staff?

A. We have to have a private telephone to the theatre, and we have five thousand dollars of telephone bills; we have two telephone operators, from nine to nine, two operators, practically two staffs, we call it a staff, one short day and one long day. We have to have salesmen, our place is filled all day with people and they all want successes and that swells our losses. We make one sale in seven to every eighth person a sale and seven we lose over the telephone and at the counter, owing to not having the merchandise the person desires. They all want front seats.

Q. They want tickets for the successful plays and not for the others?

A. Yes, sir. We have eighteen salesmen, a cashier and head bookkeeper and a credit man and six assistant bookkeepers; we have over five thousand charge accounts.

Q. And you have messengers take the tickets to the place?

A. We deliver tickets to the theatre or send them to your home or leave them at your downtown office, or you stop for them on your way home.

Q. Do you have an established rate of profit?

A. It is fifty cents, we are not allowed to charge more.

Q. You have charged more in some cases?

A. We charge fifty cents for every ticket we handle.

Q. What you have said, as to the method of doing business is practically the same in all cases?

A. Yes, sir.

[fol. 17] Q. Are there cases when you do charge more than fifty cents?

A. Yes, sir.

Q. Explain?

A. If a customer insists upon two tickets or four tickets for a certain attraction and we have not got them, and the customer requests or suggests that we go out and purchase them outside, we do that, and in that case we pay the market price and still add fifty cents for our service.

By Justice Nolan:

Q. What makes the market price?

A. The law of supply and demand.

Q. What is the law of supply and demand in reference to theatre tickets?

A. If a show is a big success everyone wants to see it.

Q. What makes the market price, the scalpers on the street, the speculators, or at the box office?

A. I don't quite get that.

By Mr. Marshall:

Q. Suppose there is a performance of Hamlet and it is very popular?

A. Yes, sir.

Q. And we will say you have no tickets for that and that you have a customer who desires two tickets for that play?

A. Yes, sir.

Q. In the case you have to go out and get these tickets for whatever is charged you?

A. Yes, sir, whatever is charged us by somebody else.

Q. And the fifty cents is payment for the service that you rendered to this customer for getting him those tickets?

A. Yes, sir, correct.

Q. You get for him the ticket that is indicated and for your [fol. 18] service to the customer in supplying him with that ticket you make this additional charge?

A. Yes, sir.

Q. When you have not got the tickets you go out and get them from the person who may have them?

A. Yes, sir.

Q. Precisely as if you wanted to buy any other article for which there is a great demand and a limited supply, you have to pay whatever the man who has the article demands of you?

A. Yes, sir.

By Justice Nolan:

Q. And the man that has the article, that is what you determine as the market price?

A. Yes, sir.

By Mr. Marshall:

Q. Will you explain what these charge accounts are, the way in which you carry on the business in reference to the charge accounts? You have five thousand customers whose names are on your books?

A. Yes, sir.

Q. They purchase tickets regularly?

A. Yes, sir.

Q. If they want to go to a theatre, they call you up and say that they want a certain number of tickets and they want you to get them for them?

A. Yes, sir.

Q. And you get them the tickets and you charge them the amount that they are to pay you?

A. Yes, sir.

Q. And every month you send them a statement and they pay you the amount?

A. Yes, sir, and we have losses at the end of the year.

[fol. 19] Q. Sometimes they don't pay, just as in the case of any other credit business?

A. Yes, sir.

Q. If these people did not get these tickets from you in this way, how would they get them, they would have to go to the box office?

A. No, sir. The best they could get for any show is the fifteenth or sixteenth row.

Q. The best seats have been sold?

A. The choice seats.

Q. If anyone desires to go to the theatre for them at night, they would be far back in the house?

A. Yes, sir.

Q. Some of your customers are people who are hard of hearing?

A. Yes, sir.

Q. And they desire to get front seats?

A. Yes, sir.

Q. And there are some whose eyesight is bad?

A. Yes, sir. We have only one customer who wants the last row, she is afraid of fire.

Q. The further towards the front they get, the better they like it?

A. Yes, sir.

Q. If they stood in line at the theatre, they would have to stand there for quite a time?

A. Yes, sir.

Q. And they would have to leave their homes and places of business and wait around the theatre and lose a lot of time?

A. Yes, sir.

Q. And you as theatre ticket broker relieve the customer of all that inconvenience and annoyance?

A. Yes, sir.

Q. Isn't it a fact that you sell tickets to people who live out of town?

A. Yes, sir, we receive letters from all over the state, and from as far away as Los Angeles, and I believe we have fifty customers [fol. 20] in St. Louis alone, and we get orders every day by mail.

Q. They inform you that they will be in New York at a certain time?

A. Yes, sir, and that they want so many seats and they want to see so many shows, and send us their checks and leave the amount blank. Up until ten years ago you could get choice seats for $2.00, and now if the theatre has a success it cost up to $5.50. If it is a failure it goes to the cut-rate ticket office. At best there are two hundred desirable seats for successful shows in New York City, with an audience of one thousand to crowd into these two hundred seats. Nobody wants to go back of the tenth row, they all want the first five or six rows and it is impossible to please them all.

By Justice Herrman:

Q. If the play runs long enough can't they be suited?

A. Lightning ran three years, and there were thousands who did not get a chance to see it. Each office gets a few front seats, there are about two hundred choice seats, there are four to the small offices and fifty to the larger offices, how far the tickets will go in the first ten rows.

By Mr. Marshall:

Q. There are a great many strangers in town at various hotels?

A. Yes, sir.

Q. They don't know long in advance of their coming when they will be here or what they want to see and yet they wish to go to the theatre?

A. Yes, sir.

[fol. 21] Q. If they had to get their tickets in the old fashioned way, they would not be able to go to the theatre?

A. No, sir.

Q. And therefore they avail themselves of the agency of the ticket brokers, who will perform for them that service?

A. Yes, sir. We also take back all tickets up until eight o'clock. We got fifty-six cancellations last Thursday. We do that as a courtesy to the customer and the customer must be pleased, and if he brings a ticket back, the loss is ours if we cannot sell them.

Q. How many of these tickets prove to be a loss of a night?

A. Sometimes one hundred and sometimes two hundred. We have tickets running into $250,000 a year.

Q. Tickets you can never dispose of?

A. Yes, sir.

Q. And that includes tickets that were returned to you that you cannot dispose of?

A. Yes, sir. We have a customer ring up and orders tickets, and we presume he is on the wire, and when the bill is rendered he denies the goods and says he never saw the show and never had the goods. We have hundreds of cases where the loss is ours.

Q. If a man has not a very large establishment such as yours, who has not so large a business as yours, he has to charge more than fifty cents to make ends meet?

A. Yes, sir, he cannot exist on it. We only have at best ten successes annually and we produce a hundred shows, and seventy-five of them are rank failures.

Q. They all have to have places of business and telephones and all other expenses?

A. Yes, sir.

Q. And the total amount of their expenses is such that in order to [fol. 22] get an ordinary revenue out of the business, they have to charge above fifty cents on the price indicated on the ticket?

A. Yes, sir.

Mr. Marshall: As illustration, I offer in evidence the statement of the defendant, Reuben Weller.

Mr. Hogan: Under our general objection.

Mr. Marshall: It is a statement of the business done by Mr. Weller, the defendant in this case, from the period January 1st, 1921, to October 31st, 1922, showing the total receipts, the number of seats sold each month, the total premium that he received in all of his operating expenses.

Mr. Hogan: Under the general objection to strike out all of this testimony.

The Court: Objection overruled. The statement is received in evidence.

(Marked Defendant's Exhibit "A" in evidence.)

Q. The amount received for tickets over and above the amount marked on the ticket is called premium?

A. Yes, sir.

Q. What is meant by deadwood?

A. Unsold tickets, which is a great part of the operating expenses

[fol. 23] DEFENDANT'S EXHIBIT "A" IN EVIDENCE

Weller's Ticket Office

Statement of Receipts and Expenditures for the Period Janaury 1, 1921, to October 31, 1922

1921

	Tickets sold	Premium	
January	1,740	$913.50	
February	1,721	903.52	
March	1,672	877.80	
April	960	504.00	
May	586	307.65	
June	412	216.30	
July	155	81.38	
August	400	210.00	
September	890	467.25	
October	435	228.37	
November	518	271.95	
December	650	341.25	
Total premiums			$5,322.97
Operating expense:			
Rent		$3,792.00	
Salaries		2,400.00	
Telephone		225.00	
Sundry		282.00	
Deadwood		318.00	
Total operating expense			7,017.00
Loss for the year 1921			$1,694.03

[fol. 24] 1922

January	417	$218.92	
February	406	213.15	
March	337	176.93	
April	339	177.98	
May	413	216.83	
June	282	148.05	
July	179	93.98	
August	239	125.48	
September	364	191.10	
October	462	242.55	
Total premiums			$1,804.97

Operating expense:

Rent	$2,160.00	
Salaries	2,000.00	
Telephone	185.00	
Sundry	220.00	
Deadwood	205.00	
Total operating expense		4,770.00
Loss January 1, 1922, to October 31, 1922		$2,965.03

Cross-examination by Mr. Kilroe:

Q. Where is your place of business?
A. 1490 Broadway.
Q. How many people interested in your business?
A. Myself, Mr. Tyson and Mr. Kiesel.
Q. How many tickets do you sell per year?
A. Over one thousand tickets a day.
[fol. 25] Q. That would be over three hundred thousand tickets a year?
A. Yes, sir.
Q. Your concern has not gone into bankruptcy?
A. No, sir.
Q. It has made money?
A. Made a good comfortable living.
Q. Have you a license?
A. No, sir.
Q. How many theatres are there in the Borough of Manhattan?
A. Approximately sixty first class theatres.
Q. Do you know what their capacity are?
A. Some as low as two hundred.
Q. The total capacity?
A. Around sixty thousand or fifty-five thousand.
Q. How many ticket speculators are there?
A. Ticket brokers.
Q. Yes, how many?
A. Tyson and Company have eighteen branches, would you call it one office, or call each branch an office.
Q. Call each branch a separate office?
A. About thirty offices.
Q. There are thirty offices where you can buy tickets from ticket brokers?
A. Yes, sir.
Q. And they are controlled by how many people?
A. Probably a dozen or fifteen.
Q. McBride is one of the largest?
A. Yes, sir.
Q. And he sells approximately how many tickets a year? Five hundred thousand tickets a year?
A. I think so.

Q. And his rate is fifty cents over the amount printed on the ticket?

A. Yes, sir.

Q. He has not gone into bankruptcy?

A. Not that I heard of.

Q. He has been doing business for forty-five years?

A. Yes, sir.

[fol. 26] Q. Do you know whether McBride has a license?

A. I could not answer that.

Q. Have you heard that he has?

A. I have not.

Q. Have you heard how many tickets are sold by the brokers in a year?

A. Approximately two million tickets.

Q. And that would be at least fifty per cent of the desirable seats in the theatre?

A. In the downstairs only.

Q. They don't deal in balcony seats?

A. The broker does not handle cheap seats, we don't sell ten a year. He might pick out for a success six of the cheaper seats, no reputable house will take only the first ten or twelve rows.

Q. Would you say, that the greatest percentage of the tickets sold are sold to out of town men?

A. I don't know.

Q. Don't you know that it is almost impossible for a resident of New York to get a choice seat?

A. No, sir, I don't agree with you; ninety or ninety-five per cent of my business is New Yorkers.

Q. You say, you sometimes charge over fifty cents?

A. Yes, sir.

Q. In what percentage of the tickets that you sell would that happen?

A. Ten tickets a day, or twenty tickets a day.

Q. Not any more?

A. Yes, sir, and many days none at all.

Q. The occasion for charging more than fifty cents is because you have to go outside and pay more for the tickets?

A. Yes, sir, right.

Q. Isn't it a custom among the brokers that they practice very extensively, if a man comes in for a ticket, the broker will say, I have not got it but I can get it for you, and have one of the salesmen take [fol. 27] it out of his pocket?

A. No, sir, not us, we will give two tickets or the tickets, if he will give us two tickets for some other night in exchange.

Q. How many buy-outs a year does your concern make?

A. Approximately one hundred.

Q What do you mean where you take a block of seats?

A. We are compelled to buy so many tickets for each show eight weeks in advance.

Q. The producer insists on you taking the seats?

A. Yes, sir.

Q. Do you have to pay a premium for good seats?
A. There was never a premium, only when they are on sale, they charge ten per cent.
Q. Didn't they charge twenty-five per cent?
A. They did but not since the war.
Q. Do you remember an investigation that was conducted two years ago by the District Attorney's office?
A. Yes, sir.
Q. Do you remember the testimony of Mr. Fallon then?
A. No, sir, I don't.
Q. Were you present at that time?
A. I don't think I was.
Q. Among the thirty speculators, how do you arrange as to who gets the tickets?
A. Every one gets a few. I have the same seats year in and year out, if I am entitled to from 101 to 108 I get them.

By Mr. Marshall:

Q. The box office makes its schedule?
A. Yes, sir, and the succeeding man gives you the same seats.
Q. And that saves them a lot of trouble?
A. Yes, sir.

[fol. 28] By Mr. Kilroe:

Q. And you charge for them at fifty cents advance?
A. Yes, sir.

By Justice Nolan:

Q. Tell us how many of these 300,000 odd seats you get at the open market price?
A. Three or five thousand.
Q. That you get by exchange?
A. We don't charge any more on the exchange, we accommodate each other.
Q. About how many would you buy at the market price?
A. Sometimes ten or twenty a day and sometimes none.
Q. About how many out of the 300,000 seats that you sell?
A. I don't think it would not exceed five or ten thousand. We have a very short season, it only extends six months.

Mr. Marshall: Defendant rests.
Mr. Kilroe: We desire to offer in evidence, with the consent of Mr. Marshall, Exhibits A, B, C, D, E, F, G and H, from pages 30 to 43, in the printed case on appeal of the People of the State of New York against Leo Newman and have it put in this record.
Mr. Marshall: I don't object to it.
The Court: It will be received without objection. Received in evidence.

(Marked People's Exhibit 2 in Evidence.)

[fol. 29] IN COURT OF SPECIAL SESSIONS

People's Exhibit 2

EXHIBIT A (PART OF COMPLAINT)

Statement of David Warfield to A. D. A. Kilroe September 23rd, 1918

Steno.: Egan.
Present: Joseph Rosenback.

By Mr. Kilroe:

Q. What is the name of your concern?
A. Theatre Ticket Library.
Q. That is a corporation?
A. No, it is a trade name.
Q. Who owns the business?
A. I own the business and my brother.
Q. What is your brother's name?
A. Barney Warfield.
Q. Where do you reside?
A. 2090 7th Avenue.
Q. How long have you been in the theatre ticket business?
A. About 17 years.
Q. You have a permit from the U. S. Government?
A. Surely.
Q. In whose name is that?
A. In the name of the Theatre Ticket Library, my name.
Q. The trade name?
A. That's right.
Q. Were you selling tickets for Yip Yip Yaphank?
A. I sold a few tickets; about 40 or 50 tickets for the three weeks.
Q. At what price?
A. Some tickets that I purchased for $3.50 I sold for $4.00.
Q. Do you make an entry of every purchase you make?
A. Absolutely.
Q. And of every sale?
A. Absolutely; the government gets 10% of the selling prices and we collect that from the public.
Q. How do you keep your records?
[fol. 30] A. We have books; the books are always open the same as any other concern.
Q. How many men have you got in your employ?
A. About five.
Q. No more?
A. No more.
Q. Any men selling on commissions?
A. No; we are the only men who sell them on the inside.
Q. Got any steerers out?

A. No steerers whatsoever.

Q. Don't have any going out along the line?

A. No.

Q. Give me the names of the men you got working for you?

A. Dan Morris, John Dunlevy, Sam Clark and a new errand boy; he has only been employed three days. I wouldn't know their addresses.

Q. Have you got a record of their addresses?

A. I have it in the office.

Q. And when they went to work?

A. Yes.

Q. What do these men work at?

A. They sell tickets behind the counter and answer the telephone.

Q. What do they do outside?

A. We have an errand boy that delivers return tickets at the box offices.

Q. You only have five men in your employ?

A. Yes, sir.

Q. Any women in your employ?

A. No women.

Q. You mentioned four of them?

A. And Abe Levy.

Q. What does he do?

A. He delivers tickets on the outside.

Q. How much do these men get?

A. They average all the way from $11 a week up to $40.

Q. No commissions are paid?

A. No commissions at all, straight salary.

[fol. 31] Q. Will you bring your books down here so that we can see them?

A. Certainly.

Q. How old are these men?

A. Dan Morris is 36, Johnny is about 17, Abe Levy is about 34 or 35.

Q. Have you ever handled any tickets for any charity enterprise?

A. Very few.

Q. Do you keep a cash register?

A. No, every seat that we sell is registerd.

Q. How?

A. We have a sales book.

Q. How are they kept?

A. Everything is entered in the book, and the selling price is entered and the return tickets are checked up.

Q. If I come in and I buy four tickets at $5 apiece, what entry is made?

A. Four tickets cost $5 and the government so much, and the name of the theatre and the day of the charge account is entered.

Q. Who is your bookkeeper?

A. Dan Morris.

Q. Nothing is sold out on the sidewalk?

A. No, it is too petty. The only fellow I have is Abe Levy calling outside of our door.

Q. Was he arrested?
A. Yes.
A. How many times?
A. Two or three times. He was arrested and arraigned before Magistrate Nolan about three months ago; he was discharged.

EXHIBIT B (PART OF COMPLAINT)

In re Ticket Speculation

Statement of James F. Mulligan

Made to A. D. A. Kilroe.
Date: October 12th, 1918.
Steno.: Egan.

I am the vice-president of Boscom, Inc., a New York corporation. [fol. 92] This concern is engaged in the sale of tickets, newspapers, magazines and periodicals. This concern has offices at the Biltmore, Manhattan and Plaza Hotels and The Ansonia. We are to have the New Commodore when it is ready for occupancy. I think the rental of the Biltmore is about $800 a month. We have a written lease for ten years; the first five years is to be at $600 a month, but it increases about $100 a month each year; it is on a sliding scale. It is to remain at $700 a month and I think it remains that way for the next five years. The rental at the Plaza is now between $500 and $600. I think this lease is for ten years. I don't know how the lease at the Commodore stands; it is on a sliding scale. The Ansonia is really a branch of the Biltmore. Our yearly income for tickets at all places between January, 1918, and October, 1918, is as follows:

Gross	72,000
	81,000
	70,500
	57,000
	37,000
	25,000
	32,000
	62,000
	436,500

Income at the Different Hotels

A	28,000
B	125,500
C	74,800
	3) 228,300
	76,100

[fol. 33] The most we ever obligated ourselves during the last year was $1,600 or $1,700. We pay by the week. The producer had a right to rely on us for $1,600 worth of tickets for a particular show within a certain period. The highest figure for any one show a week would be about $400. We never bought four months in advance. Any one can come into Boscom's and get his tickets out of the rack for 50 cents extra plus war tax. We pay 25 cents to the house for our tickets.

Exhibit C

In re Theatre Ticket Speculators

Statement of Mr. David Marks, Taken by Mr. Edwin P. Kilroe, Assistant District Attorney, November 13, 1918

I am the president of the United Theatre Ticket Corporation. We are incorporated under the laws of the State of New York and have our main and only office at 1465 Broadway. None of our stockholders are play producers.

We sell considerably over 100,000 tickets a year. Our monthly sales of course vary. In the summer time they run very low. We average from eight to ten thousand a month. In the month of September we sold 7,368 tickets.

Our rent is $7,500 a year, for a long term of years. Our payroll amounts to about $1,800 a month. We have six men actively engaged in selling tickets. The highest salary paid is $60 a week. Besides these six men we have six other employees, four of them being delivery or messenger boys, and a stenographer and a bookkeeper.

[fol. 34] About 95% of my business is done on a 50 cents advance basis. The government has investigated us and found that to be the case. Of course some tickets we sell for more than a 50 cents advanced price. Every man in the business has to do that to offset losses. I get stuck on some tickets myself at times.

I have handled opera tickets, but didn't get any bonus on them this year. We did in former years. I am a regular subscriber this year, the same as Tyson or McBride. We pay a bonus on them to the subscribers that we buy from, and then we charge a bonus. I have no fixed rule on opera tickets. Most of the time I sell for 50 cent advances. For tonight's and tomorrow night's opera, for instance, I would be glad to sell the tickets for half price. Opera tickets don't sell well unless Caruso or Farrar are the headline artists.

One good show has to carry about five bad shows. There are about 100 shows produced in this city each year. Out of the 100 productions 60 of them are absolute flat failures, 25 of the others are what we call mediocres, and the last 15 are successes, about 6 of which are real good successes, and the others are pretty fair. We "buy out" in advance for about fifty of these productions annually. That's blind gamble, because we buy out a certain quantity without even

knowing who is in the cast. Out of the fifty we have six successes, real successes. Now, we have forty, about forty shows, which entail an absolute loss to us, costing my office alone from $5,000 to $10,000 a year in dead losses, that is, tickets which we couldn't well sell at all or tickets we had to sell at less than what they cost us. Now the six successes must necessarily help us to pay the losses on the other forty bad ones.

[fol. 35] In "buy-outs" every agent is called in and told that they are going to produce, for instance, the "Ziegfeld Follies," and it's going to be a grand thing and all that and they ask each agent how much he wants to get, thus insuring his production for eight weeks.

Usually I take care of seven agents on the "buy-outs" besides tickets for my own office. The largest sum of money I have paid in advance for one production was on the "Ziegfeld Follies" this year. I bought and paid for in advance $40,000 worth of tickets for this production for myself and my seven agents. We have about fifty "buy-outs" a year.

A "buy-out" practically insures the success of a show. We have to pledge ourselves to take a certain number of tickets each night for eight weeks, paying the actual cash one or two weeks in advance, renewing some of the buy-out pledges. We even have to pay a 25 cent advance on many tickets, and on real successes do not get any returns allowed. On some shows where we pay a 25 cent advance we are allowed a 25% return before 7:30 P. M. Mr. Ziegfeld tried to make us pay a 50 cent advance but we turned him down. We bought from practically every producer.

I refuse to answer your question as to how much it costs to "oil" the treasurers to get good locations. We don't manipulate the treasurers. We get the tickets on buy-outs. The treasurer has nothing to do with that.

The people I buy tickets for besides my own office are (Wesley) Tyson & Bro., 1 West 42nd Street; Louis Cohen, Times Building; Edward Alexander, 41st Street and Broadway; Leo Newman, Broadway and 42nd Street; New York Ticket Library (Warfield), 212 West 42nd Street; J. L. Marks, 1598 Broadway; Rollman 111 Broad-
[fol. 36] way (Trinty Building); and myself—United Theatre Ticket Company, 1465 Broadway.

I am handing you a statement showing the profits I make. I don't even average a fifty cent profit on all my tickets including those sold at high prices.

In London they sell tickets to the agents at a ten per cent. discount. If they did that here we could easily live up to a 50 cent limit on profits in selling tickets.

If you will co-operate with the managers and ticket men in this way take three ticket men, three managers, your office, our attorney for our side, an attorney for the managers, and take three theatregoers and sit down and have a conference on the matter you might be able to accomplish much. Let them thrash this out and appoint a committee to investigate our books and then arrive at a fair conclusion as to what ought to be done in all fairness. In this way you could probably accomplish a great deal of good, and I make that as a suggestion to you.

Exhibit D

In re Investigation Theatre Ticket Speculation

Statement of William J. Fallon, Tyson Co., 1482 Broadway, New York City. (Telephone, Bryant 9000)

To: A. D. A. Kilroe.
Present: D. A. D. A. Sullivan, Thomas Naughton, Manager for Tyson Co.
Stenographer: F. W. Craig.

My home is at Setauket, Long Island, N. Y. I stop at the Van- [fol. 37] derbilt Hotel when in New York City. The Tyson Co. does a theatrical ticket brokerage business. We have news stands and sell cigars, candy, etc. The Tyson Co. is a New York Corporation. I am the principal stockholder, and C. B. Zabriskie has an interest in it. Mr. Zabriskie is in the borax business. That is my business, too. There are two or three other stockholders. Shuberts at one time held stock in it. I bought them out. They have no interest in it now directly or indirectly. They haven't owned a share of stock in it since September 9, 1916, I think. No other Tyson has any interest in it. There is one share held by some Fannie Hamilton. I have 99% of the stock. We have 19 branch offices in this city. This booklet shows where they are (handing same to Mr. Kilroe). Our lease at the Waldorf Astoria has about four years to run. The rental is $12,000 a year. Our lease at the Hotel Knickerbocker has about three more years to run; at the Hotel Vanderbilt, four years. We pay $2,400 a year at the St. Regis Hotel. The rate there is more reasonable because it is a family hotel. At the Hotel Breslin we pay $4,000 a year, and our lease has a year to run there. At the Hotel Wolcott we pay $50 a month. The office at the Hotel Pennsylvania is on a percentage basis; I give them 80% of the profits, net profits. We pay $8,000 a year at the Hotel Belmont, and the lease has about three years to run. At the Savoy Hotel we pay $2,000 a year. At the Holland House we pay $2,400. At the Hotel Claridge we do not pay any rent; we just share the profits there. At the Hotel Le Marquis we pay no rent; profit sharing basis. At the Hotel Antionette we pay $600 a year. We pay $7,200 at the Hotel Astor a year; the Ritz-Carlton $4,000 a year, the Hotel Martin- [fol. 38] ique $4,000 a year. The Hotel Imperial $10,000, the Murray Hill Hotel $4,000, the Hotel Stratford, no rental, that is profit sharing basis. We pay $4,000 a year rental at 1482 Broadway. We sell about a million tickets a year. We have some Boston offices, also. Our weekly salary list is about $2,000 or $2,200. The highest salary we pay is $8,000 a year. I think we had 18 buy-outs within the last year. When conditions are normal, say last winter, we bought out two, four, eight weeks ahead. We have bought 21 weeks ahead within the last five years; 400 seats a night for 21 weeks, an entire floor, that is, 57,600 tickets, nearly $120,000. We bought those ahead at one time, at one theatre and paid for them

two weeks at a time. I do not care if you make this fact known publicly. We have paid commissions, as high a commission as $20,000. All that appeared before the Legislature. I think I produced the checks up there, with Marc Klaw's signature on them. We have the checks now that were produced before that legislative committee. We had no return privileges at all. We get returns now. We did not get a return on the Potash and Perlmutter show. We sell tickets at 50 cents advance on the regular price. We get about 25 cents a ticket gross. For instance $2 tickets are sold by us for $2.50. Our policy is to charge only 50 cents a ticket more than we pay for the ticket.

[fol. 39] EXHIBIT E

United Theatre Ticket Company—Statement of Business

For the month of September, 1918:

Cash sales for month	14,128.95	
Charge sales for month	9,936.35	
Total sales for month	24,065.30	
Agencies	34,072.20	
Tickets on hand Sept. 30, 1918	2,621.15	
Total		60,758.65
Purchases for month	55,973.15	
Tickets on hand Sept. 1, 1918	1,160.90	
Total		57,134.05
Gross profits		3,624.60
Charges against same:		
Rent	618.34	
Casts	7.25	
Unsold tickets	127.00	
Telephones	105.00	
Discounts	91.20	
General expenses	701.12	
Water and ice	5.24	
Salaries	1,883.00	
Car fares	28.00	
Portages	16.60	
Total expenses		3,582.75
Net earnings		41.85

Total tickets sold for month	7,368.00
Total gross profits for month	3,624.60

Average about 49 1/5 cents a ticket.

[fol. 40] EXHIBIT F

In re Theatre Ticket Speculation

Statement of Louis Cohen, Taken by Mr. Edwin P. Kilroe, Assistant District Attorney, November 13th, 1918

I have my place at the Times Building, and have no other office. I am incorporated, and I am the only stockholder in the corporation. I sell about 30,000 tickets a year. My salary list is about $1,200. I pay $4,500 a year rental, on an annual lease. On the buy-outs Mr. Marks here has explained that. On the good shows and the bad shows, the same thing as he had told you about applies in my case. He buys all the tickets for me on the buy-outs. I buy them individually on some shows. When I took so many tickets for "Friendly Enemies," I had to take so many for "Under Orders," and we had to sell the tickets for "Under Orders" for $1 each to get them off our hands to avoid losing the total cost of those tickets.

EXHIBIT G

Theatre Ticket Library

Question 1. One office, $4,800 yearly.
Question 2. 55,000 tickets sold yearly.
Question 3. $13,000 yearly expense.
Question 4. $615.54 income tax.
Question 5. $525 monthly salary list.
Question 6. 6 persons employed.
Question 7. 600,000 purchased yearly.

[fol. 41] EXHIBIT H

CITY OF NEW YORK,
County of New York,
State of New York, ss:

John McBride, being duly sworn, deposes and says that he is an officer, to wit, treasurer of the McBride Theatre Ticket Offices, Inc., with principal place of business at 71 Broadway, New York City, Borough of Manhattan, and branch offices at 66 Broadway, 1497

Broadway, Hotel McAlpin, Waldorf Astoria, and Wallick Hotel, in the Borough of Manhattan, City of New York.

That the business in which deponent is engaged is that of buying and selling theatre tickets and tickets of admission to places of amusement; that the said business was established by deponent's father, Thomas J. McBride, 45 years ago, and has continued in business without interruption since its establishment; and that deponent has been associated in this business with his father from 1894 to date, a period of 25 years; that during this entire period of time it has been the policy of the McBride Company to only charge their patrons 50 cents higher than the box office prices on each ticket sold, except on occasions when the McBride agency did not have the tickets desired, in which case customers were warned if they insisted on purchasing through the McBride agency particular tickets it would be necessary to buy them in the open market or some other speculator, and that they would be charged 50 cents over the price paid to the other speculator or in the open market. Ninety-eight per cent. of the business has been conducted on a 50 cent increase over box office rates basis, the exception in the over-charge of prices [fol. 42] above mentioned occurring very seldom.

The deponent's company sells approximately 500,000 tickets per year. The policy of charging a brokerage fee of 50 cents on each ticket sold by deponent's company has resulted in the growth and development of a profitable business enterprise, and which enterprise is now thriving, and the volume of business increasing from year to year.

John McBride.

Sworn to before me this 21st day of January, 1919. John J. Buckley, Notary Public, New York County. New York County Clerk's No. 292. New York County Register's No. 10015. Commission expires March 30, 1920.

ARGUMENT OF COUNSEL

Mr. Marshall: It is conceded that the statement of Mr. Weller, Defendant's Exhibit A that has been put in evidence is a true and correct statement.

Mr. Hogan: We will concede that if Mr. Weller was called he would swear to it.

Mr. Marshall: The statement of Mr. Weller, Exhibit A, is a correct and true statement of the receipts and expenditures of his business.

The Court: If Mr. Weller was called he would testify to the matter in Defendant's Exhibit A in evidence.

Mr. Hogan: We will concede that.

Mr. Marshall: Defendant's case.

Mr. Hogan: People's case.

[fol. 43] Mr. Marshall: I move to dismiss the proceeding and discharge the defendant on the grounds:

First. The proof adduced by the People does not sustain the complaint.

Second. The proofs do not establish the commission of an offense under any statute of the State of New York.

Third. Chapter 590 of the Laws of 1922, upon which the complaint herein is based and with violation of which defendant is charged, is unconstitutional and void, and each and every section thereof is unconstitutional and void, under Article 1, Section 6, of the Constitution of the State of New York, and the Fourteenth Amendment to the Constitution of the United States, in that it:

(A) Deprives the defendant of his liberty and property without due process of the law by interfering with his following a lawful occupation from which he derives his livelihood with the sale of his services in procuring tickets and with the disposition of tickets acquired by him; and

(B) In that the provisions of said Chapter 590 of the Laws of 1922, relative to the procurement of a license for carrying on the business of a ticket broker, are so interwoven with and dependent upon the provisions of said statute relating to the limitation of the amount which a ticket broker is permitted to charge for tickets as to be unconstitutional and void, because it deprives the owner of such tickets of his liberty and property without due process of law, and the entire statute is thereby rendered unconstitutional and void, under Article 1, Section 6, of the Constitution of the State of New York.

Four. Chapter 590 of the Laws of 1922, upon which the complaint [fol. 44] herein is based, is unconstitutional and void, under Article 1, Section 6, of the Constitution of the State of New York, in that it requires the payment of an excessive license fee.

Five. Chapter 590 of the Laws of 1922, upon which the complaint herein is based, is unconstitutional and void under Article 1, Section 6, of the Constitution of the State of New York, in that it requires the procurement of a bond as a condition precedent for the issuance of a license to a ticket broker and permits such license to be revoked and such bond to be declared forfeited and to be enforced in the event that the ticket broker follows his lawful occupation to earn a livelihood and sells tickets at a price in excess of that provided by the statute.

JUDGMENT—February 2, 1923

The Court finds the defendant Guilty.

Defendant's Counsel: I take exception to the ruling of the Court. I move to set aside the Judgment of Conviction and for an arrest of judgment, on all the grounds urged upon the Trial, particularly that the facts stated in the Complaint do not constitute a crime, and that the law applied to the facts here is unconstitutional and void for the reason stated on the motion to dismiss.

Motion denied on each ground.

Defendant's Counsel: Defendant respectfully excepts on each ground.

SENTENCE—February 16, 1923

Before Hons. John J. Freschi, Presiding Justice, Daniel F. Murphy, Frederic Kernochan, Justices

Sentence.—To pay a fine of $25 and in default of the payment thereof to stand committed to the City Prison for five days.

[fol. 45] IN COURT OF SPECIAL SESSIONS

AFFIDAVIT RAPHAEL BRILL

Raphael Brill, being duly sworn says: I am the managing attorney in the office of Guggenheimer, Untermyer & Marshall, the attorneys for defendant herein. I am familiar with all the proceedings herein. No written opinion was handed down by the Court on the rendition of the decision herein.

Raphael Brill.

Sworn to before me this 9th day of March, 1923. J. George Silberstein, Notary Public, Kings Co., No. 670. King's Register No. 3333. Certificate filed New York County No. 395. New York Register No. 3705. Certificate filed Bronx County No. 51. Bronx Register No. 146. Term expires March 30, 1923.

[fol. 46] IN COURT OF SPECIAL SESSIONS

CLERK'S CERTIFICATE

I, Joseph F. Moss, Jr., Clerk of the Court of Special Sessions of the City of New York, held in and for the County of New York, do hereby certify that the annexed is a copy of the notice of appeal, stenographer's minutes, and the judgment roll in the case of The People against Reuben Weller, on file in the Clerk's office, and that the same has been compared by me with the original and is a correct transcript therefrom, and of the whole of such original.

Given under my hand and attested by the seal of the said Court this 21st day of March, in the year of our Lord, One Thousand Nine Hundred and Twenty-three.

Joseph F. Moss, Jr., Clerk. (Seal.)

[fol. 47] IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS

SIRS: Please take notice that the above named defendant, Reuben Weller, hereby appeals to the Court of Appeals from the order and judgment of the Appellate Division of the Supreme Court, First Judicial Department, entered in the office of the Clerk of said Appellate Division on the 30th day of November, 1923, and a certified copy of which was filed in the office of the Clerk of the Court of Special Sessions of the City of New York on the 1st day of December, 1923, which order and judgment affirmed the judgment of conviction rendered against the above-named defendant in the above-entitled court on the 16th day of February, 1923, convicting the defendant of a violation of Sections 168 and 169 of the General Business Law, added by Chapter 590 of the Laws of 1922, and imposing a fine of $25.00 and upon failure to pay said fine that [fol. 48] the defendant serve five days in the penitentiary of the County of New York; and the above-named defendant hereby appeals from each and every part of said order and judgment.

Dated, New York, December 3, 1923.

Yours, &c., Guggenheimer, Untermyer & Marshall, Attorneys for Defendant.

Office and Post Office Address, 120 Broadway, Borough of Manhattan, City of New York, N. Y.

To Joab H. Banton, Esq., District Attorney of New York County, Attorney for Plaintiff, Criminal Court Building, New York City, and to the Clerk of the Court of Special Sessions.

[fol. 49] IN SUPREME COURT

[Title omitted]

JUDGMENT

An appeal having been taken to this court by the defendant from the judgment of the Court of Special Sessions of the City of New York, rendered on the 16th day of February, 1923, and said appeal having been argued by Mr. Louis Marshall, of counsel for the appellant, and by Mr. Robert D. Petty, of counsel for the respondent; and due deliberation having been had thereon,

It is ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed. Two of the Justices dissenting.

Enter.

J. P. C.

[fol. 50] IN SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

[Title omitted]

OPINION

Appeal by defendant from a judgment of the Court of Special Sessions of the City of New York rendered on the 16th day of February, 1923, convicting the defendant of a violation of the provisions of the Business Law, Section 168, added by chapter 590 of the laws of 1922.

Louis Marshall, of counsel (James Marshall with him on the brief) for appellant.

Robert D. Petty, of counsel (Felix C. Benvenga with him on the brief; Joab H. Banton, District Attorney) for respondent.

[fol. 51] MARTIN, J.:

The Information charged that the defendant "on the 26th day of October, 1922, at the City of New York, in the County of New York, unlawfully did engage in the business of reselling tickets of admission to a theatre and place of amusement, and did resell to one John Cuniff a ticket of admission to a certain theatre and place of amusement called Palace Theatre, without first having obtained the necessary license therefor, from the Comptroller of the State of New York as required by law." The defendant was convicted and sentenced to pay a fine of twenty-five dollars, or in default of payment thereof, to stand committed to the City Prison for five days.

The General Business Law, Chapter 25, Laws of 1909, was amended by the Laws of 1922, Chapter 590, by inserting therein a new Article X-B, which reads in part as follows:

Theatre Tickets

"Sec. 167. Matter of Public Interest.—It is hereby determined and declared that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the State for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses.

"Sec. 168. Reselling of Tickets of Admission; Licenses.—No person, firm or corporation shall resell or engage in the business [fol. 52] of reselling any tickets of admission or any other evidence of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held without having first procured a license therefor from the comptroller. Such license shall be granted upon

the payment by or on behalf of the applicant of a fee of one hundred dollars and shall be renewed upon the payment of a like fee annually. Such license shall not be transferred or assigned, except by permission of the comptroller. Such license shall run to the first day of January next ensuing the date thereof, unless sooner revoked by the comptroller. Such license shall be granted upon a written application setting forth such information as the comptroller may require in order to enable him to carry into effect the provisions of this article and shall be accompanied by proof satisfactory to the comptroller of the moral character of the applicant."

By the terms of the statute under which the defendant was convicted, which became a law April 12, 1922, all persons are prohibited from engaging in the business of reselling theatre tickets, unless they first obtain a license from the State Comptroller. The Act also places a restriction on the price which licensed ticket sellers may charge the public for theatre tickets over the "box office prices," the prices at which they have been purchased by the speculator. The price may not be increased more than fifty cents over that charged by the theatre.

[fol. 53] The constitutionality of this Act is challenged upon the ground that the statute violates the State Constitution and the Federal Constitution. It is asserted by the appellant that the power sought to be exercised by virtue of the statute in question is not within the police power. It is principally contended by defendant that the statute is unconstitutional because of an illegal interference with his calling and because of its price-fixing feature, it being asserted that this feature is so interwoven with the licensing provision that in any event the entire statute must fail.

It is argued for the People that the whole statute is constitutional; that the operation of places of amusement is a matter "affected with a public interest"; that there is a right in the legislature not only to license such places but to fix the prices at which tickets may be resold by a ticket speculator or broker.

The ticket speculator is described and his business explained in Collister vs. Hayman et al., 183 N. Y., 250, at page 254, where the Court said:

"A ticket speculator is one who sells at an advance over the price charged by the management. Speculation of this kind frequently leads to abuse, especially when the theatre is full and but few tickets are left, so that extortionate prices may be exacted. A regulation of the proprietor, which tends to protect his patrons from extortionate prices is reasonable and he has the right to make it a part of the contract and a condition of the sale. Unless he can control the matter by contract and by conditions appearing upon the face of the ticket which is evidence of the contract, he may [fol. 54] not be able to control it at all, but must leave his patrons to the mercy of speculators, such as the plaintiff, who, as he alleges, was accustomed to make at least $4,000 a year from his business.

That amount, of course, came out of patrons of the theatre and if other ticket speculators carrying on the same business at various theatres in the City of New York are equally successful, the additional expense to theatre-goers must be very large."

There seems to be ample evidence that the calling of the ticket speculator has been associated with certain abuses, and all efforts to remedy these, we are told, have been in vain. The managers of theatres profess to be unable to cope with the evil, asserting that they have made efforts to do so. Governor Miller, when signing the act now under consideration, gave expression to a popular sentiment when he said the bill was aimed at "an undoubted abuse." The Legislature of this State has said in passing this Act that there is a great necessity therefor. The Act was prefaced by the following paragraph:

"It is hereby determined and declared that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the State for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses."

An excerpt from the opinion in the case of People vs. Newman, 109 Misc., 622, at page 660, another one of the cases now under [fol. 55] consideration, also indicates the necessity for legislation to remedy the admitted abuses. The Court said:

"I am not unappreciative of the fact that this ordinance was passed in answer to a wide-spread public demand to prevent ticket brokers from charging extortionate prices for admission to theatres where popular entertainments are produced, the result being that persons of ordinary means find it almost impossible to purchase tickets for such plays or are required to wait weeks, if not months, before the privilege is accorded to them to witness such performances at a reasonable price.

"Both the theatre and the ticket speculator thrive because the public is willing to pay any excessive price that may be asked.

"There is no doubt that the evil flowing from this business should be corrected, but the relief, unfortunately, for the reasons already pointed out, cannot come through the courts for the courts are merely the interpreters of the law. In California and Illinois the people have sought to remedy a similar situation, but the legislation was declared to be unconstitutional.

"The remedy, in my judgment, can come from the producing managers of the theatres. This can be accomplished through the medium of a contract entered into between the producing managers of the theatres and ticket brokers to sell tickets at reasonable prices. This arrangement can be made effective if the parties will act in good faith. Fixing reasonable prices for theatre tickets will not violate the law of monopoly because entertainments of the stage

[fol. 56] do not come within the inhibition of the anti-monopoly law. In fact, the entire subject is within the absolute control of the producing managers of the theaters as was pointed out in Collistor vs. Hayman."

Further evidence of abuses which flow from the business of ticket speculating is furnished by the legislation that has been passed in a number of the states, aimed at improving the conditions surrounding the sale and distribution of tickets.

In the City of Chicago the people were confronted with similar abuses, and a law enacted to provide a remedy was upheld in the case of People ex rel. Cort Theatre vs. Thompson, 283 Ill., 87. At page 90 the Court, passing on the validity of an ordinance of the City of Chicago, said:

"The question to be determined is whether, in granting a license to conduct a place of public amusement subject to regulation and the police power, a provision that the licensee shall not enter into an arrangement with ticket brokers or scalpers under which the licensee and the ticket brokers or scalpers both represent that the ticket brokers or scalpers are independent dealers and owners of tickets when in reality they are not owners but confederates, and the ticket brokers or scalpers sell the tickets at higher prices for the joint benefit of the licensee and themselves, and by means of falsehood and misrepresentation that all tickets to a performance have been sold a portion of the public are required to pay higher prices for the same accommodations than others, is an invasion of rights [fol. 57] guaranteed by the State and Federal Constitutions."

Places of amusement may be licensed. It has been held that the operation of a theatre is subject to the power of the State or Municipality to require a license. In the case of People vs. King, 110 N. Y., 418, at pages 427, 428, the Court said:

"By the common law, innkeepers and common carriers are bound to furnish equal facilities to all, without discrimination, because public policy requires them to do so. The business of conducting a theatre or place of public amusement is also a private business in which any one may engage, in the absence of any statute or ordinance. But it has been the practice, which has passed unchallenged, for the Legislature to confer upon municipalities the power to regulate by ordinance the licensing of theatres and shows, and to enforce restrictions relating to such places, in the public interest, and no one claims that such statutes are an invasion of the right of liberty or property guaranteed by the Constitution.

"The statute in question assumes to regulate the conduct of owners or managers of places of public resort in the respect mentioned. The principle stated by Waite, Ch., J., in Munn vs. Illinois, supra, which received the assent of the majority of the court, applies in this case. 'Where,' says the Chief Judge, 'one devotes his property to a use in which the public have an interest, he, in effect, grants to the public an interest in that use, and must

submit to be controlled by the public for the common good, to the [fol. 58] extent of the interest he has thus created.' In the judgment of the Legislature, the public had an interest to prevent race discrimination between citizens, on the part of the persons maintaining places of public amusement, and the *quasi* public use to which the owner of such a place devoted his property, gives the Legislature a right to interfere."

In Aaron vs. Ward, 203 N. Y., 351, at page 356, the Court held that the business of conducting a theatre was not a strictly private business. In Lemieux vs. Young, 211 U. S., 489, it was held that the prevention of fraud is always a proper purpose for the enactment of laws regulating a business or occupation.

Although the theatre may serve many useful purposes, its most important functions are the promotion of public welfare and education. As the population becomes more congested in great cities, as the hours of labor become shorter, the necessity of affording recreation, amusement and education to the inhabitants becomes more imperative. Therefore, the theatre becomes more essential to the welfare of the public; it becomes more "affected with a public interest."

Historically considered, theatres may be regarded as "affected with a public interest." A. E. Haight in his book, "The Attic Theatre," at page 4 said:

"To provide for the amusement and instruction of the people was, according to the Greeks, one of the regular duties of a government; and they would have thought it unwise to abandon to private ventures an institution which possessed the educational value and wide popularity of the drama."

[fol. 59] That there is ample justification for licensing those engaged in reselling theatre tickets appears to be beyond question. Ordinarily tickets are not resold at the theatre. One purchasing them from a speculator must rely upon him in many respects. If the speculator is dishonest he may sell tickets which will not be honored at the theatre, or tickets for which there is no production to be seen. The purchaser is not on an equal footing with the speculator, and this gives the public an interest in seeing that those engaged in that occupation are persons of character suited thereto, and also in having safeguards provided which will insure protection to the public as well as an adequate remedy to those defrauded.

The overwhelming evidence shows an abuse. It is the duty therefore of governmental agencies to meet the conditions and find a remedy. It is idle to say that the State and City are powerless to prevent fraud and extortion in the resale of theatre tickets. The evils of theatre ticket speculating are undisputed. The street speculator in particular has become a nuisance. His purpose is to prey on the people by selling his tickets at an extortionate price.

A statute which requires a ticket speculator to obtain a license

and thus protect the public is constitutional. In People ex rel. Armstrong vs. Warden, 183 N. Y., 223, at page 226, the Court said:

"All business and occupations are conducted subject to the exercise of the police power. Individual freedom must yield to regulations for the public good. It may be laid down as a general principle that legislation is valid which has for its object the promotion of the public health, safety, morals, convenience and general welfare or the prevention of fraud or immorality."

[fol. 60] The rule was laid down in People vs. Beakes Dairy Co., 222 N. Y., 416, at page 427, where the Court said:

"Any trade, calling or occupation may be reasonably regulated if 'the general nature of the business is such that unless regulated many persons may be exposed to misfortunes against which the Legislature can properly protect them.' "

It appears from the record in this case that the control of admission tickets to theatres and other places of public amusement is largely in the hands of a comparatively small number of the so-called ticket speculators or brokers. They constitute in a large measure the distributors of theatre tickets to the general public. Millions of tickets are sold annually to the public by the speculators. Frequently they purchase the most desirable part of the house for the whole season. Any regulation, therefore, relating to the sale of tickets for admission to theatres and places of public amusement, which does not take into account the persons who in practice control admission to such places, would be of little value so far as the general public interest are concerned. It is, therefore, clearly a business subject to legislative control and regulation.

In the face of the overwhelming and undisputed evidence of an abuse, we are told that the sole remedy must come from the producing managers of the theatre. To concede that, there is no cure for the evil excepting through a remedy initiated by the managers of theatres, would be to admit that, on account of constitutional restrictions, the State in this instance is without power to promote the general welfare of the People by legislating to meet the evil, [fol. 61] to accomplish a plain governmental purpose.

In People ex rel. Durham R. Corp. vs. LaFetra, 230 N. Y., 451, the Court after adverting to the conditions which called for a remedy, said:

"Curative action is needed. While some may question whether it may be said without exaggeration that these enactments promote the public health or morals or safety, they do in a measurable degree promote the convenience of many, which is the public convenience, and the public welfare and advantage in the face of the extraordinary and unforeseen public exigency, which the Legislature has, on sufficient evidence found to exist.

The conclusion is, in the light of present theories of the police power, that the State may regulate a business however honest in

itself, if it is or may become an instrument of widespread oppression (People vs. Beakes Dairy Co., supra, and cases cited; Payne vs. Kansas, 248 U. S., 112); that the business of renting homes in the City of New York is now such an instrument and has, therefore, become subject to control by the public for the common good; that the regulation of rents and the suspension of possessory remedies so far tend to accomplish the purpose as to supervene the constitutional inhibitions relied upon to defeat the laws before us (Marcus Brown Holding Co. vs. Feldman, 269 Fed. Rep., 306)."

The chief attribute to the police power is that it is flexible and adaptive, that it expands to meet new conditions and keeps pace with new developments (Eubank vs. City of Richmond, 226 U. S., [fol. 62] 137, 142; Hadacheck vs. Los Angeles, 239 U. S., 394, 410). The rights of the community are the supreme consideration to which those of the individual must yield. As said by the Court in Union Dry Goods Co. vs. Georgia, P. S. Corp., 248 U. S., 372, 375:

"That private contract rights must yield to the public welfare, where the latter is approximately declared and defined and the two conflict, has been often decided by this court."

We find many exercises of this power in recent times which formerly might have been considered of doubtful validity. A striking instance of this broadening of the police power and a departure from earlier decisions is the case of Klein vs. Maravelas, 219 N. Y., 383, 384, 386, where the Court, construing the sales in bulk law, said the decision in the earlier case of Wright vs. Hart, 182 N. Y., 330, was wrong. The latter case had been decided about ten years before Klein vs. Maravelas.

The situation in relation to the statute now under review is in many respects similar to that of the act passed to prevent fraudulent sales in bulk, which law was known as the "Sales in Bulk Law." The sole purpose of that law was to remedy an admittedly widespread evil and prevent fraud. When the statute first came before the Court of Appeals it was held unconstitutional. Thereafter courts in many of the States of the Union, the Federal Courts, and the United States Supreme Court, held similar statutes constitutional.

The court of Appeals of this State, in the case of Klein vs. Maravelas, supra, then held a sales in bulk law constitutional, and said:

[fol. 63] "Since Wright vs. Hart was decided, the validity of like statutes has been upheld in two cases by the United States Supreme Court, Lemieux vs. Young, 211 U. S. 489; Kidd Dater & Price Co. vs. Musselman Grocery Co., 217 U. S., 461. Objection to this statute on the ground of conflict with the federal constitution has thus been removed. We have still to determine, however, whether there is any conflict with our State constitution; and that requires us to say whether we shall adhere to our decision in Wright vs. Hart.

We think it is our duty to hold that the decision in Wright vs.

Hart is wrong. The unanimous or all but unanimous voice of the judges of the land, in federal and state courts alike, has upheld the constitutionality of these laws. At the time of our decision in Wright vs. Hart, such laws were new and strange. They were thought in the prevailing opinion to represent the fitful prejudices of the hour (Wright vs. Hart, supra, at page 342). The fact is that they have come to stay, and like laws may be found on the statute books of every state." * * *

The reasoning of the dissenting opinion in Wright vs. Hart, 182 N. Y., 330, written by Judge Vann, which was afterwards referred to with approval by the United States Supreme Court in the case of Lemieux vs. Young, 211 U. S., 489, sustains the validity of the act now before the Court. It was said by him:

"The question before us is one of power, not of policy. Courts may pass upon the power of the legislature, but not upon its policy. [fol. 64] Statutes, whether wise or unwise, are equally binding upon us, provided no provision of either Constitution is molested. According to the general rule, unless there is a plain conflict between a statute and the constitution, the statute stands, for every presumption is in its favor. * * *

"Starting always with the presumption that the statute, although challenged, is valid, we study it in connection with the constitution to see whether there is such a conflict as to divest the legislature of jurisdiction. If purporting to be passed in the exercise of the police power, we endeavor to see, first, whether there was an evil to be remedied and, secondly, whether the remedy prescribed is 'calculated, intended, convenient or appropriate' to suppress it and not designed to trespass upon personal rights 'under the guise of a police regulation.' * * * The police power cannot be arbitrarily exercised so as to deprive the citizen of his liberty or property, 'but a statute does not work such a deprivation in the constitutional sense, simply because it imposes burdens or abridges freedom of action, or regulates occupations or subjects individuals or property to restraints in matters indifferent, except as they affect public interest or the rights of others. Legislation under the police power infringes the constitutional guaranty only when it is extended to subjects not within its scope and purview, as that power was defined and understood when the Constitution was adopted."

In the case now before the Court, the evil having been proved beyond all question, the legislature properly found a remedy. [fol. 65] The opinion of Judge Vann indicates that the remedy is a proper one. He says at page 354:

"The legislation under consideration was intended to suppress a deep-seated evil, common in sales of a certain kind. The existence of the evil is admitted, and the right of the legislature to provide a remedy is also admitted, but it is insisted that the remedy provided is so unreasonable that it violates the primary guaranties of

the Constitution. The same claim was made when a maximum price was fixed for doing a certain kind of work, but it was rejected, because the work was done in a business affected with a public interest. (People vs. Budd, supra). The same position was taken when one state absolutely prohibited sales on margin and another options to buy or sell at a future time, contracts which were previously valid, but both provisions were sustained by the Supreme Court of the United States, because they tended to prevent gambling. (Booth vs. Illinois, supra, and Otis vs. Parker, supra.) While many contracts of the kind prohibited were free from wrong, as so many were made for the purpose of gambling, all were swept away, the good and bad alike. Is gambling a worse evil than fraud? Does it affect commerce more seriously? Is freedom of contract interfered with more by requiring notice to creditors before certain sales are made, than by forbidding certain other sales altogether? The statute is intended to interfere only with those who buy or sell in bad faith toward the creditors of the vendor. It doubtless interferes with some who act in good faith, but so do the other statutes referred to. In order to prevent injustice and fraud, legislation for [fol. 66] time out of mind has placed some restraint upon commercial transactions, and where the legislature has jurisdiction to act the method of supressing the evil is wholly within its sound discretion."

In a case such as is now before the Court the police power should be exerted to protect the public.

The construction of a statute similar to the one before the Court, which had for its sole object the prevention of frauds and abuses which were generally known, was upheld by the United States Supreme Court. That statute interfered with the freedom of contract, but the Court said:

"That the Court below was right in holding that the subject with which the statute dealt was within the lawful scope of the police authority of the State, we think is too clear to require discussion. As pointed out by Vann, J., in a dissenting opinion delivered by him in Wright vs. Hart, 182 N. Y., 350, the subject has been, with great unanimity, considered not only to be within the police power, but as requiring an exertion of such power" (Lemieux vs. Young, supra).

In the case of People ex rel, Armstrong vs. the Warden, supra, at page 226, it was held that a statute passed solely for the prevention of fraud was a valid enactment. In People vs. Beakes Dairy Co., 222 N. Y., 416, at page 427, the Court held that the State might regulate a business, however honest, which might become a source of fraud. An appropriate method of meeting evils which result from the carrying on of a business is licensing on terms pre- [fol. 67] scribed by law (State vs. Conlon, 33 Atl. Rep., 519-521).

The State in this case is not prohibiting the carrying on of any business, nor is it discriminating against particular persons or a

particular class. Any person, wishing to do so, may engage in the business of reselling tickets, but only after obtaining a license in conformity with the regulations imposed by law, one of the conditions being that he must file a bond to guarantee the fulfilment of the obligations prescribed by statute.

The method now pursued in the disposal or resale of tickets was described at the trial. It is interesting in that it shows a community of interest between the theatre managers and the brokers who sell to the public or an underwriting of the attraction by the speculator for which the public must pay. The hope of expectation that the abuses or evils in theatre ticket speculation may be remedied by the producing managers is dispelled by the testimony in this case.

David Marks testified that he was in the business of selling tickets for thirty years and was well acquainted with the ticket brokerage business; that it had been carried on for over sixty years; and that the pioneer in the business was George Tyson. He further testified that the "general way in which the business is carried on is that we have charge accounts with various people in the City of New York and outside of New York and we also do a cash business. A charge of fifty cents is maintained in the large offices in the City of New York. We are compelled to buy merchandise months in advance and if the show is a poor show, the loss is ours. We look upon these tickets as merchandise. We get the tickets from the theatre managers. We buy them in blocks. Each office is allowed [fol. 68] so many seats. The theatre managers put on a production. They say to the ticket brokers that they will allow them to have a certain number of tickets for that production. That arrangement is made before the show is cast and before we know anything about who is in the show, we are sent for and told how many tickets we are to get and each office has to pay, is compelled to buy. We are sent for by the managers of the various productions and the theatre owners and they say, "We are to produce a show four weeks from next Monday night and it is going to open at a certain theatre," and they say, "how many seats do you want for that show for eight weeks in advance." We have asked for time to see how many we could use for that particular theatre, but in many cases we are not given time and we must purchase the number of tickets buying and paying for them eight weeks in advance, when we don't know the name of the show or the cast, and we are compelled to buy them at four and five dollars apiece, plus the war tax, and compelled to pay for them and pay for them at that rate for eight weeks in advance, running into an investment of fifty or sixty thousand dollars. In other words we finance the theatrical performance and we have to pay in advance. It takes hundreds of thousands of dollars. If the play is not successful the tickets are left on our hands. We have a return privilege of 25, sometimes 15 and sometimes 10. They (speaking of theatre managers or owners) allocate to the several ticket brokers of the city the number of tickets that they may have and the number that they are required to take if they want any tickets. We have a private

telephone to the theatre. We deliver tickets to the theatre or send them to your home or leave them at your downtown office, or you [fol. 69] stop for them on your way home. If a customer insists upon two tickets or four tickets for a certain attraction and we have not got them, and the customer requests or suggests that we go out and purchase them outside, we do that, and in that case we pay the market price and still add fifty cents for our service."

This testimony gives an idea of the theatre ticket business which is carried on by the brokers, and how intimately connected it is with that of the theatre and theatre owners and managers.

It is apparent from this record that the theatres and ticket brokers have an understanding or arrangement for the resale of tickets. The modern method of selling tickets indicates that there is a working agreement between the managers or owners and the speculator or ticket brokers.

By the terms of the statute in question the ticket speculator is permitted to carry on his business and is permitted to make a reasonable profit. The act is therefor not confiscatory. It is not attacked upon the ground that it is confiscatory or that it prevents a fair profit.

A witness for the defendant on his direct examination testified that for services rendered a ticket broker makes a charge of fifty cents; that the established rate of profit "is fifty cents, we are not allowed to charge more." This testimony referred to the increase over the box office prices of tickets obtained directly from the theatre. It is established on the record that the advance of fifty cents is the amount customarily taken by the speculator for himself, over the price he pays for the ticket. In the business itself it is established that this is a reasonable charge for the service rendered by him [fol. 70] so that it was shown in this case that the statute does not tend to have a confiscatory effect.

In Reagan vs. Farmers Loan & Trust Co., 154 U. S., 362; at page 398, interpreting the decision of Budd vs. New York, 143 U. S., 517, it is said:

"Hence there was no occasion for saying anything as to the power or duty of the courts in case the rates as established had been found to be unreasonable. It was enough that upon examination it appears that there was no evidence upon which it could be adjudged that the rates were in fact open to objection on that ground."

It is true that the testimony is that on a resale of a theatre ticket bought from another agency the speculator still adds fifty cents for his services. This does not make it unreasonable to limit the speculator who handles the tickets to a service charge of fifty cents per ticket; for were it to be justified, the process of rehandling the tickets and adding additional charges could go on indefinitely, to the defeat of all regulation of this kind.

This combination of theatre owner or manager with speculator or broker by which the attraction is financed or underwritten by the ticket broker or speculator, tends to a monopoly which prevents

the public from seeing the performance on any reasonable terms. Under the circumstances disclosed, the regulation of the business of reselling tickets would seem not only a necessary, but also a proper means of meeting the evils sought to be remedied.

In People ex rel Cort Theatre Co. vs. Thompson, supra, at page [fol. 71] 97, the Court said:

"The question here is whether the constitution protects a theatre owner in a scheme by which an applicant for a ticket is told that the house is sold out, and upon going to the ticket scalper is permitted to select the part of the house where he desires to sit and the ticket scalper turns to the telephone and directs the theatre to send up a ticket, which is sent and sold at an advanced price.

The business of the theatre owner or manager is private in the sense that no franchise from the State is required, but it is no more private than the business of hawkers, peddlers, pawnbrokers, keepers of ordinaries, circuses or other shows and amusements which invite the public generally to attend and exist entirely by the public. A place of amusement to which the public are generally invited upon no condition but the payment of a fixed charge is public in a general sense, and it differs radically from accommodations offered by a merchant or professional man, who, while he invites everyone to enter, does so only for the purpose of selling to each individual services or merchandise."

In Budd vs. New York, 143 U. S., 517, the Court said:

"In Sinking Fund Cases, 99 U. S., 700, 747, Mr. Justice Bradley, who was one of the Justices who concurred in the opinion of the court in Munn vs. Illinois, speaking of that case said: 'The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employ-[fol. 72] ment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power.' Although this was said in a dissenting opinion in Sinking Fund Cases, it shows what Mr. Justice Bradley regarded as the principle of the decision of Munn vs. Illinois."

In Ratcliff vs. Wichita Union Stock Yards Co., 74 Kansas, 1, at page 7, the Court said:

"Public necessity and the public welfare are the broad general grounds upon which the right of legislative control is based, rather than that a special privilege has been conferred in consideration of which public control is conceded or required. In Munn vs. Illinois, 94 U. S., 113, 24 L. Ed., 77, Chief Justice Waite, referring to the right to regulate business under the police power said: 'The Government regulates the conduct of its citizens one toward another, and

the manner in which each shall use his own property, when such regulation becomes necessary for the public good' (page 125). Upon these considerations the business of banking has been subjected to control, and the right to regulate the interest which may be charged for the use of money is now unquestioned. The police power is exercised in controlling the business of insurance, the operation of mills, hotels, theatres, wharves, markets, warehouses for the storage [fol. 73] of grain and tobacco, common carriers, the collection and distribution of news, and the business of supplying and distributing water and gas. Some of these rest upon considerations of health, or the safety or the convenience of the people, but all fall within the general grounds of public necessity and public welfare."

In Booth vs. Illinois, 184 U. S., at page 429, the Court said:

"* * * If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the Courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but a clear, unmistakable infringement of rights secured by the fundamental law. Mugler vs. Kansas, 123 U. S., 623, 661; Minnesota vs. Barber, 136 U. S., 313, 320; Brimmer vs. Rebman, 138 U. S., 78; Voight vs. Wright, 141 U. S., 62."

The right to fix reasonable rates to protect the public follows when a business is affected with a public interest.

In Block vs. Hirsh, 256 U. S., 135, at page 157, the Court said:

[fol. 74] "But if the public interest be established, the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled since Munn vs. Illinois, 94 U. S., 113."

In the case of People ex rel. Durham R. Corp. vs. La Fetra, 230 N. Y., 429, at page 445, the Court said:

"Even in the absence of an emergency, the state may pass wholesome and proper laws to regulate the use of private property. Lincoln Trust Co. vs. Williams Bldg. Corp., 229 N. Y., 313; St. Louis Poster Advertising Co. vs. City of St. Louis, 249 U. S., 269. Laws restricting the uses of property do not deal directly with the question whether a private business may be limited in its return to a reasonable rate fixed by a force external to the law of supply and demand. Aside from the war power, the regulation of prices, except for public utilities, is unusual, although usury statutes which forbid the taking of exorbitant interest on the loan of money, are common. The power of regulation exists, however, and it is not limited to public uses or to property where the right to demand and

receive service exists or to monopolies or to emergencies. It may embrace all cases of public interest and the question is whether the subject has become important enough for the public to justify public action. Munn vs. Illinois, 94 U. S., 113; German Alliance Ins. Co. vs. Kansas, 233 U. S., 389; Oklahoma Operating Co. vs. Love, 252 U. S., 331; Holter Hardware Co. vs. Boyle, 263 Fed. Rep., [fol. 75] 134; American Coal Min. Co., vs. Special C. & F. Com., supra."

See also, Union Dry Goods Co. vs. Georgia P. S. Corp., 248 U. S., 372, at page 375; Manigalt vs. Springs, 199 U. S., 473, at page 480.

In Atlantic Coast Line R. R. Co. vs. City of Goldsboro, 232 U. S., 548, the Court said:

"For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

In Munn vs. Illinois, 94 U. S., 113, at page 126, the Court said:

"* * * Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

[fol. 76] At page 134, the Court further said:

"* * * The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum charge, as one of the means of regulation, is implied. In fact, the common law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rate at will, and compel the public to yield to his terms, or forego the use."

In Rast vs. Van Deman & Lewis Co., 240 U. S., 342, at page 366, the Court said:

"That case illustrated the reach of power of government to protect or promote the general welfare. It sustained a provision of the constitution of the State of California which made void all contracts for the sale of stock of corporations on margin or to be delivered at a future day. The practice had been common. Its evil was disputed. It was attempted to be justified by argument very

much like those advanced in the case at bar, but this Court decided that the legislative judgment was controlling."

That the Legislature may fix a reasonable maximum charge for the service where the matter is one in which the public has an interest, has been settled by the decision in Munn vs. Illinois (supra). The Munn case has frequently been followed, approved and extended. (Budd vs. New York, 143 U. S., 517; Brass vs. Stoser, 153 U. S., 391; German Alliance Ins. Co. vs. Kansas, 233 U. S., 389; Wilcox vs. Consolidated Gas Co., 212 U. S., 19.)

|fol. 77| One of the chief evils of the business of ticket speculation is the exaction of exorbitant rates on the part of ticket speculators. This evil has been recognized for many years.

The principle that the Legislature has a right to interfere in such a case was clearly stated in Radcliff vs. Stock Yards Co., 74 Kansas 1, as follows:

"Many kinds of business carried on without special franchises or privileges are treated as public in character, and have therefore been subjected to legislative regulation and control. The nature and extent of the business, the fact that it closely touches a great many people and that it may afford opportunities for imposition and oppression, as in cases of monopoly and the like, and circumstances, affecting property with a public interest. Police regulations of the business of dealing in patent rights have been maintained on the theory that it affords great opportunity for imposition and fraud. (Mason vs. McLeod, 57 Kan., 105; 45 Pac., 76; 41 L. R. A., 548; 57 Am. St. Rep., 327; Allen vs. Riley, 71 Kan., 378; 80 Pac., 952)."

In German Alliance Ins. Co. vs. Kansas, supra, the language of the Court was as follows:

"The cases need no explanatory or fortifying comment. They demonstrate that a business by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge Andrews in People vs. Budd (117 N. |fol. 78| Y., 1, 27) that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the puble on those affected cannot be supported. 'The underlying principle is that business of certain kinds holds, such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation."

Reliance is placed by the Court below on three cases and it is said that they are decisive of the case now before the Court. An examination of the authorities relied upon shows that they are not in point. One case arose in California. In that case, Ex Parte Quarg, 149 Cal., 79, the Court was passing upon a statute which provided that it was a misdemeanor to sell or offer to sell a theater ticket at a price in excess of that ordinarily charged by the management.

That statute absolutely prohibited by indirection, the business of ticket broker or speculator, and prohibited anyone who bought a ticket from reselling it at any price beyond that which the theatre charged, allowing no compensation whatever for the service rendered in furnishing the ticket.

The other cases relied upon, namely, People vs. Steele, 231, Ill., 340, and People vs. Powers, 231, Ill., 560, arose in Illinois. There were very much limited by a subsequent decision of the same Court, People ex rel. Cort Theater vs. Thompson, supra, where the Court said:

"This latter case clearly points out the distinction between the Steele case, the Powers case and the case now before the Court. In [fol. 79] the Steele case, like the Quarg case in California, the ordinance prohibited the sale of tickets for more than the price printed thereon. In the Powers case the ordinance did likewise."

The statute now under consideration not only permits the resale of tickets, but allows any suitable person who desires to do so to pursue the occupation of reselling tickets. It does not limit or fix the price which the theatre may charge for tickets. It does not interfere with the sale at any price that the theatre sees fit to charge, but it provides that anyone who wishes to carry on the business of reselling tickets, must do so after he obtains a license, and that, when he does obtain the license, he must sell the ticket at a profit which is fair and reasonable. It strikes at the extortioner only. It prevents fraud and the exaction of an extortionate price from the people who desire to purchase theatre tickets.

This act regulates the charges of the speculator or broker. It prohibits those who have a monopoly of the tickets, made possible by arrangements with the theatres, from charging extortionate fees for "service" in securing and selling tickets.

We are of the opinion, therefore, that the law as enacted was not only within the Police Power, but that it was the duty of the Legislature to legislate on the subject.

We have therefore reached the conclusion that the entire statute is constitutional.

This defendant is charged with a specific crime, the crime of unlawfully reselling a ticket to a theatre or place of amusement without a license permitting such resale, in violation of the law. It was [fol. 80] proved that he did not have a license and it nowhere appears that he ever applied for one or that an application made by him was denied. There is no question but that this defendant resold theatre tickets without securing a license, and committed the acts charged in the Information.

The defendant was properly found guilty of the crime charged, and the judgment of conviction should be affirmed.

Smith and McAvoy, JJ., concur.
Clarke, P. J., and Finch, J., dissent.

IN COURT OF SPECIAL SESSIONS

CLERK'S CERTIFICATE

I, Joseph F. Moss, Jr., Clerk of the Court of Special Sessions of the City of New York, held in and for the County of New York, do hereby certify that the annexed is a copy of the notice of appeal to Appellate Division, stenographer's minutes and the judgment roll, opinion of Appellate Division, including both affirming and dissenting opinions, notice of appeal to Court of Appeals and order and judgment of affirmance in the case of the People against Reuben Weller, on file in the Clerk's Office, and that the same has been compared with the original and is a correct transcript therefrom, and of the whole of such original.

Given under my hand and attested by the seal of the said Court this 7th day of December, in the year of our Lord, One Thousand nine hundred and twenty-three.

Joseph F. Moss, Jr., Clerk. (Seal.)

[fol. 81] IN COURT OF APPEALS

OPINION—February 19, 1924

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

v.

REUBEN WELLER, Appellant

Appeal from a judgment of the appellate division affirming a judgment of the Court of Special Sessions of the city of New York convicting the defendant of unlawfully violating the provisions of section 168 of the General Business Law (reselling tickets).

Louis Marshall for appellant.

Joab H. Banton, District Attorney (Robert D. Petty of counsel), for respondent.

Joseph S. Auerbach for intervener.

LEHMAN, J.:

The defendant has been convicted upon an information which charged that he "unlawfully did engage in the business of reselling tickets of admission to a theatre and place of amusement and did resell to one John Cuniff, a ticket of admission to a certain theatre and place of amusement called Palace Theatre, without first having obtained the necessary license thereof from the comptroller of the state of New York as required by law." He does not deny that he has committed the acts charged in the information, but he contends that the provisions of the General Business Law

(Cons. Laws, ch. 20), which seek to regulate the business of reselling tickets of admission to theatres and places of public amusement transcend the power of the legislature and are unconstitutional and void. These provisions were inserted in the General Business Law (sections 167 to 174) by chapter 590 of the Laws of 1922. They prohibit any person, firm or corporation from engaging "in the business of reselling any tickets of admission or any other evidence of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held without having first procured a license therefor from the comptroller." Each applicant for a license is required to file with the application therefor a bond in the penal sum of one thousand dollars conditioned that the obligor will not be guilty of any fraud or extortion and will not exact or receive a price for any such ticket or evidence of the right of entry in excess of the price authorized by the statute. In case of a breach of the condition of the bond, suit may be brought to recover upon the bond, and in addition the comptroller is empowered to revoke the license. The statute further provides that "no licensee shall resell any such ticket * * * at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry. Every person, firm or corporation who owns, operates or controls a theatre, place of amusement or entertainment, or other place where public exhibitions, [fol. 82] games, contests, or performances are held shall, if a price be charged for admission thereto, print on the face of each such ticket or other evidence of the right of entry the price charged therefor by such person, firm or corporation."

The business of reselling tickets of admission to places of public amusement has always been regarded as a lawful business which serves the convenience and promotes the comfort of persons who desire to purchase at convenient times and places tickets which otherwise they could purchase only at the office established by the management of the places of amusement for the sale of tickets in advance of the performance until the full supply of tickets should be disposed of. The statute has not rendered the business unlawful, but it seeks to confine the business to persons obtaining a license, and to restrict drastically the price at which tickets may be resold. Such restrictions interfere with the liberty of those desiring to engage in that business and are lawful only if imposed by the legislature in the exercise of what has come to be described as the "police power."

The time has probably passed when any useful purpose can be served by further discussion of the general nature of the police power or even in most cases by citation of general definitions, though contained in opinions which we might consider authoritative. When the attempted exercise by the legislature of the power to regulate certain kinds of business and especially to fix prices was first challenged in the courts, the courts laid down the general rule that the power to regulate and fix prices depends upon whether the business is so "clothed with a public interest" as to justify reasonably

the imposition of regulations calculated to remove abuses, or perhaps even to secure benefits, in regard to features which clearly affect the public. This general rule is now well recognized but the limits of its application are still somewhat shadowy and indefinite. As the court pointed out in Wolff Packing Co. v. Industrial Court (262 U. S. 522, at page 538): "All business is subject to some kinds of public regulation; but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation is only to be determined by the process of exclusion and inclusion and to gradual establishment of a line of distinction." In the case of People v. Budd (117 N. Y. 1, at page 15) this court, speaking through Judge Andrews, in pointing out similar considerations, said:

"It must be conceded that the uses to which a man may devote his property, the price which he may charge for such use, how much he shall demand or receive for his labor, and the methods of conducting his business are, as a general rule, not the subject of legislative regulation. These are a part of our liberty, of which, under the constitutional guaranty, we cannot be deprived. We [fol. 83] have no hesitation in declaring that unless there are special conditions and circumstances which bring the business * * * within principles which, by the common law and practice of free governments, justify legislative control and regulation in the particular case, the statute * * * cannot be sustained."

Decisions of this and other courts since that time have merely tended by the process of inclusion and exclusion to indicate the nature of the "special conditions and circumstances" which may bring a business within principles which justify legislative control and regulation, and these cases may be referred to profitably only in so far as the "special conditions and circumstances" considered therein are analogous to the special conditions and circumstances under consideration by us.

The courts have frequently pointed out that the business of conducting a theatre or place of public amusement is "affected with a public interest" and it is urged by the People that by reason of this public interest the legislature may regulate the price of theatre tickets and that the business of reselling theatre tickets is so closely connected with the business of conducting the theatre that the legislature may likewise regulate the price that may be demanded or received upon the resale of tickets by "brokers" or "speculators." "To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. * * * It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. * * * The extent to which regulation may reasonably go varies with different kinds of Business." (Wolff Packing Co. v. Industrial Court, supra, p. 539.) In People v. King (110 N. Y. 418) this

court by Andrews, J., pointed out that though the business of conducting a theatre or place of public amusement is one in which any one may engage in the absence of any statute or ordinance, yet the right of the legislature to regulate the licensing of theatres and shows and to "enforce restrictions relating to such places in the public interest" has never been challenged, and that "the quasi-public use to which the owner of such a place devoted his property, gives the legislature a right to interfere" when "in its judgment the public had an interest to prevent race discrimination between citizens, on the part of persons maintaining places of public amusement." Again in Aaron v. Ward (203 N. Y. 351) the court pointed out that the business of maintaining a theatre cannot be regarded as strictly private but has always been held subject to legislative control (citing cases). Yet obviously the mere fact that the public interest in preventing race discrimination between citizens in places of public [fol. 84] resort or in the maintainance of good order in such places justifies legislative regulation which will reasonably tend to serve the public interest in these respects, is by no means decisive of the question of whether abuses reasonably to be feared from unrestricted and unregulated resales of theatre tickets, so closely effect the public interest as to place the regulation of the business of reselling tickets within the legislative control to the extent of permitting the legislature to limit the price which may be demanded or received upon such resale.

Section 167 of the statute recites that "it is hereby determined and declared that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses." The declaration of the legislature that the price or charge for admission is a matter affected with the public interest is not conclusive upon the courts; for the courts must in each case decide whether in fact the public interest justifies an attempted restriction by the state upon the liberty of its citizens. Not the assertion of the legislature but only the actual existence of conditions which would justify the exercise of legislative control, must be the basis of a valid exercise of the police power. Yet the indication by the legislature of its own purposes may certainly in some degree guide the courts in their consideration of the validity of the legislative assertion of power.

Statutes and ordinances prohibiting the resale of theatre tickets at an advance over the price printed on such tickets have been held unconstitutional in People v. Steele & Altschul (231 Ill. 340); City of Chicago v. Cowers (231 Ill. 560); Ex parte Quarg (149 Cal. 79). All these decisions are to some extent based upon the view that in effect the purpose of the statute was to fix prices. (See dissenting opinion in German Alliance Ins. Co. v. Kansas, 233 U. S. 389, at page 431.) In all these cases the reasoning of the court seems to rest upon two premises: First, that the business of conducting a place of amusement is essentially a private business and the legislature has

no more power to fix the prices that may be demanded or received in that business than it would have to regulate the price that may be demanded or received by a tailor, an artisan or a merchant upon the sale of services or commodities. Second, that the business of reselling tickets of admission is a lawful business performing a useful service and that any person carrying on such business should be left free to contract for the performance of such service with any person who desires to avail himself of the service afforded by such business. [fol. 85] In passing it may be remarked that in the case of People v. Thompson (283 Ill. 87) the court stated that "the business of the theatre owner or manger is private in the sense that no franchise from the state is required, but it is no more private than the business of hawkers, peddlers, pawnbrokers, keepers of ordinaries, circuses or other shows and amusements which invite the public generally to attend and exist entirely by the public. A place of amusement to which the public are generally invited upon no condition but the payment of a fixed charge is public in a general sense, and it differs radically from accommodations offered by a merchant or professional man, who, while he invites everyone to enter does so only for the purpose of selling to each individual services or merchandise." Whether the public character of the places of amusement pointed out in this distinction is, in itself, sufficient to give the legislature power to control the prices which may be charged by the proprietor of a place of public amusement has not even been considered by us, for the present statute does not attempt to fix the price which may be charged by the proprietor, but merely requires him to "print on the face of each such ticket or other evidence of the right of entry, the price charged therefor" by him. No theatre proprietor is now challenging that provision so we are not called upon to express any opinion concerning its validity, though a similar provision in an ordinance of the city of Chicago was sustained in the case of People v. Thompson (supra). The question of whether the public is so interested in gaining admission to places of public amusement that any person who assumed to furnish tickets of admission to the public has subjected himself to the control of the legislature in regard to the price he may demand or receive; or in other words, whether the interest of the public in obtaining admission for a reasonable price is such that a statute which regulates the price instead of leaving the price to be fixed by free agreement, might reasonably be said to promote the public welfare, is determinative of the validity of the statute now under consideration only if the real abuse which the legislature has found exists, or is reasonably to be feared, and which the legislature seeks by the statute to remedy or avoid, is the abuse of unreasonably high or "exorbitant rates" charged for a quasi-public service. The legislature has, however, pointed out that the statute is enacted "for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses" and we may profitably consider in the first place whether "extortion" or exorbitant prices exacted by oppression instead of fixed by free agreement, is not the real abuse which the legislature is seking to remedy,

and if so whether the legislature has the power to remedy the abuse of "extortion" by price regulation.

We are, of course, not confining the word "extortion" to the defini- [fol. 86] tion of the crime of extortion in the Penal Law, for the legislature could not have intended it in that narrow sense. We mean, and we think the legislature intended, by that word, the exaction of money made possible because of oppressive conditions or circumstances as distinguished from the receipt of money as a result of free negotiations an willingly paid for a service or commodity. In the present case a witness, produced by the defendant himself, testified that those engaged in the business of reselling tickets are compelled by theatre managers, even before the first performance of a new play, to buy and pay for seats eight weeks in advance. They dispose of approximately two million theatre seats a year, or at least half of the seats in the orchestra of the various theatres, and at times the pay commissions or bonuses to the management to obtain seats. Persons desiring seats near the front cannot obtain them at the box office of the theatre. "The best they could get for any show is the fifteenth or sixteenth row." Under these circumstances it cannot be doubted that when ticket brokers or speculators are permitted to charge any price which they can obtain from a buyer upon the resale of tickets of admission, abuses are not only reasonably to be feared, but actually exist. Indeed the courts have recognized the existence of abuses, due to these conditions, even before this statute was enacted by the legislature. Without unnecessarily multiplying quotations from opinions of the courts, we may point out that in Collister v. Hayman (183 N. Y. 250, 254) this court stated: "A ticket speculator is one who sells at an advance over the price charged by the management. Speculation of this kind frequently leads to abuse, especially when the theatre is full and but few tickets are left, so that extortionate prices may be exacted. A regulation of the proprietor, which tends to protect his patrons from extortionate prices is reasonable and he has the right to make it part of the contract and a condition of the sale. Unless he can control the matter by contract and by conditions appearing upon the face of the ticket which is evidence of the contract, he may not be able to control it at all, but must leave his patrons to the mercy of speculators, such as the plaintiff, who, as he alleges, was accustomed to make at least $4,000 a year from his business. That amount, of course, came out of patrons of the theatre and if other ticket speculators carrying on the same business at various theatres in the city of New York are equally successful, the additional expense to theatre-goers must be very large." The same respect for individual liberty, which should ordinarily deter the legislature from an attempt to restrict freedom, might under special circumstances impel the legislature to seek a remedy for conditions which, unless controlled, will leave the patrons of the theatre "to the mercy of speculators." The liberty of the individual citizen to con- [fol. 87] tract freely should be jealously guarded even from encroachments by the state, and where barter is free and demand creates supply perhaps economic laws and not the fiat of the state is the proper corrective of exorbitant prices; but where the liberty of the in-

dividual citizen to contract freely has been restricted by the circumstance that a man or group of men has obtained control of the supply of a commodity which the public desires or commonly uses, and this control is used to compel the individual to pay any price which may be demanded though that price be far beyond the price which would be fixed by free contract between consumer and producer, a legislative mandate which regulates the exercise of the compulsive force may in effect restore and not diminish the liberty of the individual.

The ancient statutes against "engrossing" and "forestalling" were essentially examples of such legislative mandates. Through them Parliament sought to preserve freedom of trade by prohibition of acts which tend to restriction of free competition between the traders themselves, and "to prevent any man or set of men from possessing the power to arbitrarily determine the price at which an article of common use shall be sold because he who controls prices is the master of the world." (State v. Duluth Board of Trade, 107 Minn. 506, at page 529.) Experience and modern economic opinion based on that experience have so demonstrated the unwisdom of many of these statutes that a court to-day might hesitate to sustain as a reasonable exercise of the police power some of the restrictive statutes which seemed obviously proper centuries ago, yet the power of the legislature in a proper case to "promote the public welfare" by regulating or restricting acts which interfere with free negotiation between the consumers and producers of a commodity in common use and impede the operation of the laws of supply and demand should not be doubted (see opinion of Chief Justice White in Standard Oil Co. v. United States, 221 U. S. at pages 50 to 58), and we see no distinction in principle between commodities and privileges or licenses, such as tickets of admission, if there exists a general public demand for them and they are in common use. It may be impossible, and it certainly would be unwise, to attempt to define in general terms the circumstances which may justify legislative intervention or the degree of regulation which is reasonable, but in the present case the fact that the business of conducting places of public amusement has always been regarded as affected with a public interest, at least to the extent that it is "competent for the State to impose the condition that the proprietor shall admit or accommodate all persons impartially" (Cooley on Torts [2d ed.], 336); the evidence that the ticket brokers or speculators at least in the city of New York, with or without the [fol. 88] concurrence of the theatre managers, purchase in advance so many of the seats in the orchestra of all the theatres that the general public cannot purchase at the box office seats in the first fifteen rows and are compelled to purchase these seats, if at all, from the ticket brokers; and the fact that the public desire for admission to places of amusement is so great that exorbitant prices for tickets of admission far beyond those charged by the producers can be extorted from the general public by reason of this control of the supply by the brokers, in our opinion clearly justify reasonable restrictions by the legislature upon the business of reselling such tickets. The legislature has the power to regulate reasonably acts which lead to abuses, through which the general public is compelled to pay a group of men

for services which at least in part are not desired by the public especially where such acts occur in a business which is measurably affected with a public interest. The correction of recognized abuses need not be left to the voluntary action of the very group of men who have created the abuse and who apparently believe that the continuance of such abuses will profit them.

The sole question which we must still consider is whether the regulation of the legislature is reasonable. The statute does not forbid the ticket brokers from exercising their lawful business nor from rendering the same service to the public as they have previously rendered, and in this respect the statute differs from the statutes or ordinances condemned by the courts of Illinois and California in the cases cited above. It permits the brokers to charge an advance of fifty cents above the price charged by the managers of the theatre, and there is some evidence from which it might be inferred that this charge would afford reasonable compensation for the services rendered by them, and that it represents the usual profit made by those conducting the business on a considerable scale. It does not prohibit the producing manager from charging the public all that the public will pay, but leave the regulation of price between producer and consumer to the free play of the laws of supply and demand. It does not even prohibit brokers from obtaining control of the supply of choice seats in advance of public sale. It merely prohibits brokers from charging more than a fixed and presumably reasonable profit whether they acquire such control or not and thereby it reasonably tends to end the extortion which, the legislature could properly find, exists and constitutes an abuse which is so general and of such importance as to call for legislative remedy. The question of whether the business of conducting places of public amusement is so "affected with a public interest' as to justify the regulation of the price of admission in order to insure the right of the public to admission for a reasonable charge is not di- |fol. 89| rectly involved in this decision. But even if we were to assume that the interest of the public in such business is not in itself sufficient to justify regulation of price, yet a statute which reasonably limits the amount which brokers may charge upon the resale of a ticket in order to end the abuse of extortion of large additional amounts by reason of control of the supply should not be condemned merely because the legislature has seen fit to use price regulations as the instrument which may accomplish the desired purpose. Even though the ultimate purpose of statutes which regulate prices may be the protection of the public from excessive charges, alike where the price regulation is directed against the abuse of extortion through control of supply, by one who does not produce the supply, and where the price regulatin is directed against the alleged abuse of unreasonably high prices secured by a producer through negotiation; yet in the one case the statute restricts the freedom of the individual in the performance of acts which though perhaps lawful are calculated to injure others, while in the other case the statute restricts the freedom of the individual in the performance of acts which are of such benefit to the public that even the price to be

charged for them is a matter of public concern. The special conditions and circumstances in the one case may bring a business within principles which by the common law and practice of free governments justify legislative control and regulation though such control might not be justified merely by the public character of the business. The existence of extortion due to present unregulated conditions in the business of reselling tickets of admission to places of public amusement is widely recognized; the abuse is due to acts of the ticket brokers alone or in conjunction with producers, and these acts are calculated to injure large numbers of public in connection with a business which is at least to some degree affected with a public interest. The legislature under the police power has in our opinion clearly the right under these circumstances to attempt to remedy the abuse. The proposed remedy encroaches upon the liberty of the individual only to the extent that the legislature might properly regard as reasonably calculated to remedy the abuse, and the people have placed upon the legislature the responsibility of determining whether the remedy is wise and will promote the public welfare. The courts are called upon to determine only whether the legislature has acted within its powers in enacting this legislation; the judges have no disposition, and the courts have no right, to pass upon the wisdom of its exercise.

For these reasons the judgment of the Appellate Division should be affirmed.

Hiscock, Ch. J., Cardozo, Pound, McLaughlin and Crane, JJ., concur; Andrews, J., dissents.

Judgment affirmed.

[fol. 90] IN COURT OF APPEALS

[Title omitted]

REMITTITUR—February 20, 1924

Be it remembered that on the 12th day of December in the year of our Lord One thousand nine hundred and twenty-three, Reuben Weller, the appellant in this cause, came here unto the Court of Appeals, by Guggenheimer, Untermyer & Marshall, his attorneys, and filed in the said Court a Notice of Appeals and return thereto from the Order and Judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department, affirming the judgment of Conviction of the Court of Special Sessions of the City of New York, and the People of the State of New York, the respondent in said cause, afterwards appeared in said Court of Appeals by Joab H. Banton, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid are hereunto annexed.

[fol. 91] Whereupon, the said Court of Appeals having heard this cause argued by Mr. Louis Marshall, of counsel for the appellant, and by Mr. Robert D. Petty, of counsel for the respondent, and after

due deliberation had thereon, did order and adjudge that the Judgment herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Court of Special Sessions of the City of New York, there to be proceeded upon according to law.

Therefore it is considered that the said Judgment be affirmed, as aforesaid.

And hereupon as well as the Notice of Appeal and return thereto aoftresaid by it given in the premises, are by the said Court of Appeals, remitted into the Court of Special Sessions of the City of New York, before the Justices thereof, according to the form of the statute in such case made and provided to be enforced according to law, and which record now remains in the said Court of Special Sessions, before the Justices thereof, etc.

Wm. J. Armstrong, Clerk of the Court of Appeals of the State of New York.

[fols. 92 & 93] IN COURT OF APPEALS

CLERK'S CERTIFICATE

February 20, 1924.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals with the papers originally filed therein, attached thereto.

Wm. J. Armstrong, Clerk. (Seal.)

[fol. 94] IN COURT OF APPEALS

[Title omitted]

PETITION FOR WRIT OF ERROR

Now comes Reuben Weller, by Louis Marshall, Esq., his attorney, and says that on February 23rd, 1924, the Court of Special Sessions of the City of New York, State of New York, made and entered a final judgment herein whereby it was adjudged that said Reuben Weller, the Plaintiff-in-Error, was guilty of a violation of Chapter 590 of the Laws of 1922 of the State of New York, and that he be convicted of a violation of the same and sentenced to pay a fine of Twenty-five Dollars ($25) and in default of the payment thereof to stand committed to the City Prison of the City of New York for five days, and further says that in the proceedings had in his cause prior thereto certain errors were committed to the prejudice of the Plaintiff-in-Error, all of which will more in detail appear from the Assignments of Error filed with this petition.

This action was brought in the Court of Special Sessions of the City of New York, State of New York, on an Information by Joab H. Banton, the District Attorney of the County of New York, accusing the Plaintiff-in-Error of violating Chapter 590 of the Laws of 1922 of the State of New York. Judgment was entered February 16, 1923, adjudging the Plaintiff-in-Error to be guilty of a misdemeanor in violating said statute and convicting him to pay a fine [fol. 95] of Twenty-five Dollars ($25), or in default of such payment, that he stood committed to the custody of the Keeper of the City Prison of the City of New York until such fine was paid but not exceeding five days. An appeal was thereupon taken from said judgment to the Appellate Division of the First Department of the Supreme Court of the State of New York which on the 30th day of November, 1923 affirmed the judgment of the Court of Special Sessions of the City of New York. An appeal was thereupon taken to the Court of Appeals of the State of New York, which is the highest court in said State in which a decision in this cause could be had. Thereafter the said Court of Appeals adjudged that the order of the Appellate Division so appealed from and the judgment of the Court of Special Sessions of the City of New York be affirmed and directed that the proceedings in this cause be remitted to the Court of Special Sessions of the City of New York to be proceeded upon according to law. The record of the Court of Appeals and the Remittitur from said Court was duly filed with said Court of Special Sessions of the City of New York, where said record now remains; whereupon such judgment was entered in the office of the Clerk of the Court of Special Sessions of the City of New York, State of New York, on the 23rd day of February, 1924.

Wherefore petitioner prays that a Writ of Error may issue in his behalf from the Supreme Court of the United States to the Court of Appeals of the State of New York and the Court of Special Sessions of the City of New York, State of New York, for the correction of the errors and a reversal of the judgment so complained of, that a transcript of the record, proceedings and orders in this case, only [fol. 96] authenticated, be sent to the Supreme Court of the United States, that the amount of the security which the petitioner shall give and furnish on said Writ of Error may be fixed, and that upon the giving of such security all further proceedings in the Court of Special Sessions of the City of New York, State of New York, be suspended and stayed until the decision of said Writ of Error by the Supreme Court of the United States.

Dated New York, March 25, 1924.

Reuben Weller, Petitioner, by Louis Marshall, His Attorney and Counsel.

[fol. 97] IN COURT OF APPEALS

[Title omitted]

ASSIGNMENTS OF ERROR

Now comes Reuben Weller, Plaintiff-in-Error in the above entitled cause, by Louis Marshall, his attorney, and says that in the record and proceedings in this cause there is manifest error in this, to-wit:

First. In that the Court of Appeals of the State of New York erred in adjudging that Chapter 590 of the Laws of 1922 is a constitutional act.

Second. In that the Court of Appeals of the State of New York erred in adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not deprive the plaintiff-in-error of his liberty without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Third. In that the Court of Appeals of the State of New York erred in adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not deprive the plaintiff-in-error of his property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Fourth. In that the Court of Appeals of the State of New York erred in adjudging that Chapter 590 of the Laws of 1922 of the State [fol. 98] of New York did not deny to the plaintiff-in-error the equal protection of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Fifth. In that the Court of Appeals of the State of New York erred in adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not deprive the plaintiff-in-error of his lawful occupation and livelihood without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Sixth. In that the Court of Appeals of the State of New York erred in failing to adjulge that Chapter 590 of the Laws of 1922 of the State of New York deprived the plaintiff-in-error of his liberty and property without due process of law, and denied to him the equal protection of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Seventh. In that the Court of Appeals of the State of New York erred in refusing to render judgment in favor of the plaintiff-in-error on the ground that Chapter 590 of the Laws of 1922 of the State of New York was unconstitutional and void because it deprived the plaintiff-in-error of his liberty and property without due process of law and denied to the plaintiff-in-error the equal protection of the

law under Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it:

(A) Deprives the plaintiff-in-error of his liberty and property without due process of law by interfering with his following a lawful occupation from which he derives his livelihood by the sale of his services in procuring tickets and by the disposition of tickets acquired by him;

[fol. 99] (B) In that the provisions of said Chapter 590 of the Laws of 1922, relative to the procurement of a license for carrying on the business of a ticket broker, are so interwoven with and dependent upon the provisions of said statute relating to the limitation of the amount which a ticket broker is permitted to charge for tickets as to be unconstitutional and void because it deprives the owner of such tickets of his liberty and property without due process of law, and the entire statute is thereby rendered unconstitutional and void;

(C) In that Chapter 590 of the Laws of 1922, upon which the complaint herein is based, is unconstitutional and void in that it requires the payment of an excessive license fee;

(D) In that Chapter 590 of the Laws of 1922, upon which the complaint herein is based, is unconstitutional and void, in that it requires the procurement of a bond as a condition precedent for the issuance of a license to a ticket broker and permits such license to be revoked and such bond to be declared forfeited and to be enforced in the event that the ticket broker follows his lawful occupation of earning a livelihood by selling tickets at a price in excess of that provided by the statute.

Wherefore, for these and other manifest errors, appearing in the record, Reuben Weller, the Plaintiff-in-Error, prays that the judgment entered in the Court of Special Sessions of the City of New York, State of New York, and affirmed by the Appellate Division [fol. 100] of the First Department of the Supreme Court of the State of New York and by the Court of Appeals of said State be reversed and set aside and held for naught, and that judgment be rendered for the Plaintiff-in-Error herein granting to him his rights under the laws and Constitution of the United States, and particularly the dismissal of the complaint and the setting aside of the judgment of guilty found against him in this cause.

Louis Marshall, 120 Broadway, New York City, N. Y., Attorney and Counsel for Plaintiff in Error.

[fol. 101] IN COURT OF APPEALS

[Title omitted]

ORDER ALLOWING WRIT OF ERROR

Comes now Reuben Weller, Plaintiff-in-Error above-named this 26 day of March, 1924, and files and presents his petition pray for the allowance of a Writ of Error intended to be urged by h and praying further that a duly authenticated transcript of record, proceedings and papers upon which the judgment he was rendered may be sent to the Supreme Court of the United Sta and that such other and further proceedings may be had in premises as may be just and proper.

And it appearing upon a consideration of the said petition tha this action there has been drawn in question the validity o statute of and authority exercised under the State of New York the ground of their being repugnant to the Constitution of United States and that the decision rendered by the Appel Division of the First Department of the Supreme Court and by Court of Appeals of the State of New York, the highest Courts said State in which a decision in this cause could be had, was favor of the validity of a statute of and of an authority exerci under the State of New York, it is

Ordered that a Writ of Error be allowed as prayed; provided, h ever, that Reuben Weller, the Plaintiff-in-Error, give bond acc ing to law in the sum of Two hundred and fifty Dollars ($25 which said bond shall operate as a supersedeas.

[fol. 102] In testimony whereof witness my hand this 26 day March, 1924.

Frank H. Hiscock, Chief Judge of the Court of Appeals the State of New York.

[fols. 103 & 104] BOND ON WRIT OF ERROR FOR $250—Approved a filed; omitted in printing

[fol. 105] IN COURT OF APPEALS

[Title omitted]

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Judges of the Court of Appeals of the State of New York and of the Court of Special Sessions of the City of New York, State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Court of Special Sessions of the City of New York, State of New York, after a decision rendered in said cause by the Appellate Division of the First Department of the Supreme Court of the State of New York and by the Court of Appeals of said State of New York, they being the highest courts of law and equity of said State in which a decision could be had in an action between Reuben Weller, Plaintiff-in-Error, and The People of the State of New York, Defendant-in-Error, wherein was drawn in question the validity of the statute of and authority exercised under the State of New York on the ground of their being repugnant to the Constitution of the United States and the decision rendered in said cause was in favor of their validity, and manifest error has happened to the great damage of the said Reuben Weller as by his petition appears;

We, being willing that error, if any, have happened, shall be at [fol. 106] once corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same in the said Supreme Court, at Washington, D. C., within thirty (30) days from the date hereof, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, this 27th day of March, in the year of our Lord One thousand nine hundred and twenty-four.

Alex. Gilchrist, Jr., Clerk of the United States District Court for the Southern District of New York. (Seal of District Court of the United States, Southern District of N. Y.)

Allowed by: Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York.

[fol. 107 & 108] CITATION—In usual form, showing service on John Banten; omitted in printing

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[fol. 109] IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK

CLERK'S CERTIFICATE

I, Joseph F. Moss, Jr., Clerk of the Court of Special Sessions of the City of New York, held in and for the County of New York, by virtue of the annexed Writ of Error which was served upon me on the 27th day of March, 1924, and in obedience thereto, do hereby certify that the foregoing contain a true and complete transcript of the record and proceedings had in the case of The People of the State of New York against Reuben Weller mentioned in said Writ of Error, as the same remain of record and on file in my office;

And that annexed hereto is the Petition for the said Writ of Error, the Assignment of Errors, the Allowance of the Writ of Error, the Bond, the Citation and the said Writ of Error served upon me, together with the admission of service of the said papers.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed and I have hereunto set my hand, at my office in the City and County of New York the 29th day of March, 1924.

Joseph F. Moss, Jr., Clerk of Court. (Seal of the Court of Special Sessions of the City of New York.)

Endorsed on cover: File No. 30,240. New York Court of Special Sessions of the City of New York. Term No. 349. Reuben Weller, plaintiff in error, vs. The People of the State of New York. Filed April 2, 1924. File No. 30,240.